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**SUPREME COURT, U. S.**

**APPENDIX**

Supreme Court  
**FILE**

**JUL 5**

**MICHAEL RODIN**

**Supreme Court of the United States**

**OCTOBER TERM, 1973**

**No. 72-1057 RECEIVED**

**JUL 5 - 1973**

**UNITED STATES OF AMERICA, Petitioner,**  
**OFFICE OF THE CLERK  
SUPREME COURT,**

**—v.—**

**DOMINIC NICHOLAS GIORDANO**

**UNITED STATES OF AMERICA,**

***Petitioner,***

**—v.—**

**DOMINIC NICHOLAS GIORDANO, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR CERTIORARI FILED JANUARY 31, 1973  
CERTIORARI GRANTED MARCH 26, 1973**

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1057

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UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

DOMINIC NICHOLAS GIORDANO

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*Petitioner,*

—v.—

DOMINIC NICHOLAS GIORDANO, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## RELEVANT DOCKET ENTRIES

70-04837-M

THE UNITED STATES

*vs.*

MICHAEL FOCARILE  
also known as MICKEY ROSS

DOMINIC NICHOLAS GIORDANO  
also known as NICK GINO  
also known as P. BURDI  
also known as NICK GIORDINA

JOHN CHARLES D'ANNA  
also known as JOHNNY POO

JAMES ALBERT WALLACE  
also known as BUFFALO REDS  
also known as COOTIE REDS  
also known as REDS

HERMAN LEE PETTIFORD  
also known as SKEETS  
also known as SKEEZIE

RONALD E. BLACKWELL

MARGARET HARRIS  
also known as PAT

ROLAND JAMES POPE

STANLEY SILVERSTEIN

SAMPSON WILLIAMS

DANIEL L. DORSEY  
also known as KOON

ROY LEE DAVIS  
also known as MR. FAIRFIELD  
also known as FAIRFIELD

JACK BALDWIN

RONALD JONES  
also known as FAT RONNIE

DATE	PROCEEDINGS
1970	
Dec. 16	(1) Indictment for Viol. U.S.C., Title 26, Sections 4701, 4703, 4704(a), 4771(a) and 7237(a), filed. (Conspiracy to violate the Federal Narcotic Laws)
Jan. 24	(126) Order (Miller, J.) directing that Francis S. Brocato, Assistant U. S. Attorney, furnish this Court with an Affidavit or Affidavits, setting forth the facts relating to the authorization and approval of the initial Wire Tap Order as therein more particularly set forth, filed.
Jan. 27	(128) Order (Miller, J.) extending the time within which Francis S. Brocato, Assistant, U. S. Attorney, shall produce said Affidavit or Affidavits until 5:00 p.m. on February 1, 1972 as therein more particularly set forth, filed. (See Paper No. 126 also)
Feb. 7	(129) Motion of Defendant, Roy Lee Davis, to Suppress and Memorandum in support thereof, filed.
Feb. 7	(130) Supplemental Motion of Defendant, Dominic Nicholas Giordano, to Suppress and Points and Authorities, filed.
Feb. 7	(131) Memorandum of Government concerning the exercise of authority in authorizing Title III Interception, filed.
Feb. 8	——— Hearing on Motions of Defendants to suppress before Miller,
Feb. 8	(132) Affidavit of Sol Lindenbaum and Harold P. Shapiro, filed.

DATE	PROCEEDINGS
1972	
Feb. 14	(133) Motion of Defendant, James Albert Wallace, to Suppress Wire Tap Evidence, filed.
Feb. 14	(134) Motion of Defendant, Ronald E. Blackwell, to Suppress and Memorandum in support thereof, filed.
Feb. 15	(135) Motion of Defendant, Herman Lee Pettiford, to Suppress and Memorandum of Points and Authorities, filed.
Feb. 15	(136) Order (Miller, J.) "GRANTING" Motions of Defendants, Giordano, Davis, Wallace, Blackwell, Pettiford, Harris and Williams to suppress and that the contents of any intercepted telephone communications conducted on the telephone of Dominic Nicholas Giordano from the period October 16, 1970 to November 18, 1970 as therein more particularly set forth, filed.
Feb. 16	(137) Motion of Defendants, Stanley Silverstein and Jack Baldwin to Suppress Wire Tap Evidence, filed.
Feb. 17	(138) Order (Miller, J.), "GRANTING" Motions of Defendants Baldwin and Silverstein to suppress as therein more particularly set forth, filed.
Feb. 22	(139), OPINION (Miller, J.), filed.
Feb. 22	(140) Application of Defendant, Dominic Nicholas Giordano and Authorization (Miller, J.) for Transcript of Proceedings before the Court on February 8, 1972 at the expense of the United States, filed.

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**DATE****PROCEEDINGS**

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1972

- Mar. 6**      (146) Notice of Appeal of United States of America, from Order of Court dated 2-15-72, filed. (copies mailed by Clerk—3-8-72)
- Mar. 15**    (150) Transcript of Proceedings before the Court (Miller, J.) on February 8, 1972, filed. (filed separately)

**AFFIDAVIT IN SUPPORT OF INSTALLATION OF  
A PEN REGISTER ON TELEPHONE NUMBER  
685-0211 IN THE DISTRICT OF MARYLAND**

Before me personally appeared this date Wayne A. Ambrose, Jr., a Special Agent of the Bureau of Narcotics and Dangerous Drugs, who being first duly sworn, deposes and says that:

A source of information, states that on October 1, 1970, Nicholas GIORDINA @NICK gave him telephone number 685-0211 and told this source of information to call him at this telephone number when he wished to transact narcotic business. On October 2, 1970, this source of information made a telephone call to 685-0211. GIORDINA answered the phone. This source of information asked GIORDINA if he could obtain  $\frac{1}{8}$  kilo of Heroin. GIORDINA stated that he would be ready to do business on Monday, October 5, 1970. This call was corroborated by Special Agent Ambrose in that Special Agent Ambrose personally monitored this telephone call with the permission of the source of information.

On October 5, 1970, at 7:10 a.m., this source of information made a call to telephone number 685-0211. GIORDINA answered the phone. This source of information asked GIORDINA if he could get  $\frac{1}{8}$  kilo of Heroin. GIORDINA stated that he would be ready to do business at 7:00 p.m. This telephone call was corroborated by Special Agent Ambrose in that Special Agent Ambrose personally monitored this telephone call with the permission of the source of information.

At about 7:30 p.m., on October 5, 1970, Special Agent Glenn C. Brown, Bureau of Narcotics and Dangerous Drugs, working in an undercover capacity, in the presence of the above mentioned source of information, purchased 110 grams of Heroin (39% pure), from Nicholas GIORDINA. This Heroin was not sold to Special Agent Brown in or from the original stamped package as required by 26 U.S.C. 4704(a), and the sale of this Heroin to Special Agent Brown was not made pursuant to a written order as required by 26 U.S.C. 4705(a).

Toll calls of the C&P Telephone Company of Maryland have been obtained by subpoena for telephone number 685-0211 in the District of Maryland for the months of March, April, May, June, July, August, and September, 1970. A copy of these toll calls is attached as Exhibit 1 to this affidavit.

Telephone number 685-0211 called telephone number (202) 882-5906 seven times during this period of time. Telephone number (202) 882-5906 is listed to Felicia Woods, 30 Sheridan Street, N. E., Washington, D. C. This is the residence of Joyce J. JONES @BULLDYKE JOYCE and Betty KIAH. JONES and KIAH are well known narcotic violators in the Washington, D.C. area, and are well documented in the Bureau of Narcotics and Dangerous Drugs Case Nos. E2-68-0013 and E1-69-0009. JONES is a Negro/female, Date of Birth August 5, 1941, and has FBI No. 32-662 D and MPD No. 166979. KIAH is a Negro/female, Date of Birth October 3, 1948, and has MPD No. 229704. Both JONES and KIAH have been arrested several times by the Bureau of Narcotics and Dangerous Drugs and the Metropolitan Police Department for violation of the Federal Narcotic laws. These cases have not yet been brought to trial.

Wherefore, the undersigned has probable cause to believe that the telephone number 685-0211 listed to Nicholas GIORDINA at Apt. 1304, 8 Charles Plaza, Baltimore,



Maryland, is being used by Nicholas GIORDINA in illegal traffic in narcotics distribution in the Baltimore, Maryland, area.

/s/ Wayne A. Ambrose, Jr.  
Special Agent  
Bureau of Narcotics and Dangerous Drugs

Subscribed and sworn to before me this 8th day of October, 1970.

/s/ Edward S. Northrop  
United States District Judge

/s/ Paul R. Schlitz  
Clerk

/s/ By: Elizabeth R. Schreiber  
Deputy Clerk



$\beta_{J_1}^{\text{eff}} = \frac{1}{N} \sum_{j=1}^N \beta_j$

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[illegible]

DATE	PAYEE'S SIGNATURE	CHECK NO.	AMOUNT

[illegible]

	TOTAL	TOTAL	%A
00 2187	CR	CR	99.58
00 2188	WU	WU	99.58

9	175	11	91133390	<table border="1"> <tr> <td>Ques</td> <td>MA</td> <td>ALL</td> </tr> <tr> <td></td> <td></td> <td></td> </tr> </table>	Ques	MA	ALL			
Ques	MA	ALL								

[illegible][illegible]

NO	DATE	DESCRIPTION	AMOUNT	BALANCE
6	35	111	3	97142634
7	35	111	3	97142634
8	35	111	3	97142634
9	35	111	3	97142634
10	35	111	3	97142634
11	35	111	3	97142634
12	35	111	3	97142634
13	35	111	3	97142634
14	35	111	3	97142634
15	35	111	3	97142634
16	35	111	3	97142634
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76	35	111	3	97142634
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78	35	111	3	97142634
79	35	111	3	97142634
80	35	111	3	97142634
81	35	111	3	97142634
82				

رقم	تاريخ	ملاحظات	مبلغ
35	1945		512
36	1945		512

9 35 7 41 2 49 1986

22

3091

275  
NAME  
LAST FIRST  
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Chest, Ford  
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101

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## CALLS AND TELEGRAMS

PAGE NUMBER	DATE	PLACE	CALLEE	AREA	TELEPHONE NO.	AMOUNT	EX-100	EX-101	EX-102	EX-103	EX-104	EX-105	EX-106	EX-107	EX-108	EX-109	EX-110	EX-111	EX-112	EX-113	EX-114	EX-115	EX-116	EX-117	EX-118	EX-119	EX-120	EX-121	EX-122	EX-123	EX-124	EX-125	EX-126	EX-127	EX-128	EX-129	EX-130	EX-131	EX-132	EX-133	EX-134	EX-135	EX-136	EX-137	EX-138	EX-139	EX-140	EX-141	EX-142	EX-143	EX-144	EX-145	EX-146	EX-147	EX-148	EX-149	EX-150	EX-151	EX-152	EX-153	EX-154	EX-155	EX-156	EX-157	EX-158	EX-159	EX-160	EX-161	EX-162	EX-163	EX-164	EX-165	EX-166	EX-167	EX-168	EX-169	EX-170	EX-171	EX-172	EX-173	EX-174	EX-175	EX-176	EX-177	EX-178	EX-179	EX-180	EX-181	EX-182	EX-183	EX-184	EX-185	EX-186	EX-187	EX-188	EX-189	EX-190	EX-191	EX-192	EX-193	EX-194	EX-195	EX-196	EX-197	EX-198	EX-199	EX-200	EX-201	EX-202	EX-203	EX-204	EX-205	EX-206	EX-207	EX-208	EX-209	EX-210	EX-211	EX-212	EX-213	EX-214	EX-215	EX-216	EX-217	EX-218	EX-219	EX-220	EX-221	EX-222	EX-223	EX-224	EX-225	EX-226	EX-227	EX-228	EX-229	EX-230	EX-231	EX-232	EX-233	EX-234	EX-235	EX-236	EX-237	EX-238	EX-239	EX-240	EX-241	EX-242	EX-243	EX-244	EX-245	EX-246	EX-247	EX-248	EX-249	EX-250	EX-251	EX-252	EX-253	EX-254	EX-255	EX-256	EX-257	EX-258	EX-259	EX-260	EX-261	EX-262	EX-263	EX-264	EX-265	EX-266	EX-267	EX-268	EX-269	EX-270	EX-271	EX-272	EX-273	EX-274	EX-275	EX-276	EX-277	EX-278	EX-279	EX-280	EX-281	EX-282	EX-283	EX-284	EX-285	EX-286	EX-287	EX-288	EX-289	EX-290	EX-291	EX-292	EX-293	EX-294	EX-295	EX-296	EX-297	EX-298	EX-299	EX-300	EX-301	EX-302	EX-303	EX-304	EX-305	EX-306	EX-307	EX-308	EX-309	EX-310	EX-311	EX-312	EX-313	EX-314	EX-315	EX-316	EX-317	EX-318	EX-319	EX-320	EX-321	EX-322	EX-323	EX-324	EX-325	EX-326	EX-327	EX-328	EX-329	EX-330	EX-331	EX-332	EX-333	EX-334	EX-335	EX-336	EX-337	EX-338	EX-339	EX-340	EX-341	EX-342	EX-343	EX-344	EX-345	EX-346	EX-347	EX-348	EX-349	EX-350	EX-351	EX-352	EX-353	EX-354	EX-355	EX-356	EX-357	EX-358	EX-359	EX-360	EX-361	EX-362	EX-363	EX-364	EX-365	EX-366	EX-367	EX-368	EX-369	EX-370	EX-371	EX-372	EX-373	EX-374	EX-375	EX-376	EX-377	EX-378	EX-379	EX-380	EX-381	EX-382	EX-383	EX-384	EX-385	EX-386	EX-387	EX-388	EX-389	EX-390	EX-391	EX-392	EX-393	EX-394	EX-395	EX-396	EX-397	EX-398	EX-399	EX-400	EX-401	EX-402	EX-403	EX-404	EX-405	EX-406	EX-407	EX-408	EX-409	EX-410	EX-411	EX-412	EX-413	EX-414	EX-415	EX-416	EX-417	EX-418	EX-419	EX-420	EX-421	EX-422	EX-423	EX-424	EX-425	EX-426	EX-427	EX-428	EX-429	EX-430	EX-431	EX-432	EX-433	EX-434	EX-435	EX-436	EX-437	EX-438	EX-439	EX-440	EX-441	EX-442	EX-443	EX-444	EX-445	EX-446	EX-447	EX-448	EX-449	EX-450	EX-451	EX-452	EX-453	EX-454	EX-455	EX-456	EX-457	EX-458	EX-459	EX-460	EX-461	EX-462	EX-463	EX-464	EX-465	EX-466	EX-467	EX-468	EX-469	EX-470	EX-471	EX-472	EX-473	EX-474	EX-475	EX-476	EX-477	EX-478	EX-479	EX-480	EX-481	EX-482	EX-483	EX-484	EX-485	EX-486	EX-487	EX-488	EX-489	EX-490	EX-491	EX-492	EX-493	EX-494	EX-495	EX-496	EX-497	EX-498	EX-499	EX-500	EX-501	EX-502	EX-503	EX-504	EX-505	EX-506	EX-507	EX-508	EX-509	EX-510	EX-511	EX-512	EX-513	EX-514	EX-515	EX-516	EX-517	EX-518	EX-519	EX-520	EX-521	EX-522	EX-523	EX-524	EX-525	EX-526	EX-527	EX-528	EX-529	EX-530	EX-531	EX-532	EX-533	EX-534	EX-535	EX-536	EX-537	EX-538	EX-539	EX-540	EX-541	EX-542	EX-543	EX-544	EX-545	EX-546	EX-547	EX-548	EX-549	EX-550	EX-551	EX-552	EX-553	EX-554	EX-555	EX-556	EX-557	EX-558	EX-559	EX-560	EX-561	EX-562	EX-563	EX-564	EX-565	EX-566	EX-567	EX-568	EX-569	EX-570	EX-571	EX-572	EX-573	EX-574	EX-575	EX-576	EX-577	EX-578	EX-579	EX-580	EX-581	EX-582	EX-583	EX-584	EX-585	EX-586	EX-587	EX-588	EX-589	EX-590	EX-591	EX-592	EX-593	EX-594	EX-595	EX-596	EX-597	EX-598	EX-599	EX-600	EX-601	EX-602	EX-603	EX-604	EX-605	EX-606	EX-607	EX-608	EX-609	EX-610	EX-611	EX-612	EX-613	EX-614	EX-615	EX-616	EX-617	EX-618	EX-619	EX-620	EX-621	EX-622	EX-623	EX-624	EX-625	EX-626	EX-627	EX-628	EX-629	EX-630	EX-631	EX-632	EX-633	EX-634	EX-635	EX-636	EX-637	EX-638	EX-639	EX-640	EX-641	EX-642	EX-643	EX-644	EX-645	EX-646	EX-647	EX-648	EX-649	EX-650	EX-651	EX-652	EX-653	EX-654	EX-655	EX-656	EX-657	EX-658	EX-659	EX-660	EX-661	EX-662	EX-663	EX-664	EX-665	EX-666	EX-667	EX-668	EX-669	EX-670	EX-671	EX-672	EX-673	EX-674	EX-675	EX-676	EX-677	EX-678	EX-679	EX-680	EX-681	EX-682	EX-683	EX-684	EX-685	EX-686	EX-687	EX-688	EX-689	EX-690	EX-691	EX-692	EX-693	EX-694	EX-695	EX-696	EX-697	EX-698	EX-699	EX-700	EX-701	EX-702	EX-703	EX-704	EX-705	EX-706	EX-707	EX-708	EX-709	EX-710	EX-711	EX-712	EX-713	EX-714	EX-715	EX-716	EX-717	EX-718	EX-719	EX-720	EX-721	EX-722	EX-723	EX-724	EX-725	EX-726	EX-727	EX-728	EX-729	EX-730	EX-731	EX-732	EX-733	EX-734	EX-735	EX-736	EX-737	EX-738	EX-739	EX-740	EX-741	EX-742	EX-743	EX-744	EX-745	EX-746	EX-747	EX-748	EX-749	EX-750	EX-751	EX-752	EX-753	EX-754	EX-755	EX-756	EX-757	EX-758	EX-759	EX-760	EX-761	EX-762	EX-763	EX-764	EX-765	EX-766	EX-767	EX-768	EX-769	EX-770	EX-771	EX-772	EX-773	EX-774	EX-775	EX-776	EX-777	EX-778	EX-779	EX-780	EX-781	EX-782	EX-783	EX-784	EX-785	EX-786	EX-787	EX-788	EX-789	EX-790	EX-791	EX-792	EX-793	EX-794	EX-795	EX-796	EX-797	EX-798	EX-799	EX-800	EX-801	EX-802	EX-803	EX-804	EX-805	EX-806	EX-807	EX-808	EX-809	EX-810	EX-811	EX-812	EX-813	EX-814	EX-815	EX-816	EX-817	EX-818	EX-819	EX-820	EX-821	EX-822	EX-823	EX-824	EX-825	EX-826	EX-827	EX-828	EX-829	EX-830	EX-831	EX-832	EX-833	EX-834	EX-835	EX-836	EX-837	EX-838	EX-839	EX-840	EX-841	EX-842	EX-843	EX-844	EX-845	EX-846	EX-847	EX-848	EX-849	EX-850	EX-851	EX-852	EX-853	EX-854	EX-855	EX-856	EX-857	EX-858	EX-859	EX-860	EX-861	EX-862	EX-863	EX-864	EX-865	EX-866	EX-867	EX-868	EX-869	EX-870	EX-871	EX-872	EX-873	EX-874	EX-875	EX-876	EX-877	EX-878	EX-879	EX-880	EX-881	EX-882	EX-883	EX-884	EX-885	EX-886	EX-887	EX-888	EX-889	EX-890	EX-891	EX-892	EX-893	EX-894	EX-895	EX-896	EX-897	EX-898	EX-899	EX-900	EX-901	EX-902	EX-903	EX-904	EX-905	EX-906	EX-907	EX-908	EX-909	EX-910	EX-911	EX-912	EX-913	EX-914	EX-915	EX-916	EX-917	EX-918	EX-919	EX-920	EX-921	EX-922	EX-923	EX-924	EX-925	EX-926	EX-927	EX-928	EX-929	EX-930	EX-931	EX-932	EX-933	EX-934	EX-935	EX-936	EX-937	EX-938	EX-939	EX-940	EX-941	EX-942	EX-943	EX-944	EX-945	EX-946	EX-947	EX-948	EX-949	EX-950	EX-951	EX-952	EX-953	EX-954	EX-955	EX-956	EX-957	EX-958	EX-959	EX-960	EX-961	EX-962	EX-963	EX-964	EX-965	EX-966	EX-967	EX-968	EX-969	EX-970	EX-971	EX-972	EX-973	EX-974	EX-975	EX-976	EX-977	EX-978	EX-979	EX-980	EX-981	EX-982	EX-983	EX-984	EX-985	EX-986	EX-987	EX-988	EX-989	EX-990	EX-991	EX-992	EX-993	EX-994	EX-995	EX-996	EX-997	EX-998	EX-999	EX-1000	EX-1001	EX-1002	EX-1003	EX-1004	EX-1005	EX-1006	EX-1007	EX-1008	EX-1009	EX-1010	EX-1011	EX-1012	EX-1013	EX-1014	EX-1015	EX-1016	EX-1017	EX-1018	EX-1019	EX-1020	EX-1021	EX-1022	EX-1023	EX-1024	EX-1025	EX-1026	EX-1027	EX-1028	EX-1029	EX-1030	EX-1031	EX-1032	EX-1033	EX-1034	EX-1035	EX-1036	EX-1037	EX-1038	EX-1039	EX-1040	EX-1041	EX-1042	EX
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## CALLS AND TELEGRAMS

PAGE NUMBER		BILL DATE		AREA CODE		TELEPHONE NUMBER				
2		8-19-70		201		685 0211				
DATE	PLACE	CALLED	AREA	TELEPHONE NO	AMOUNT	TYPE	CLASS	MIN	PAC	TELE
-8 15	BRKLYN NYC	NY	212	287 4840	.55	1	2	2		30151620
-8 15	CAPITOL HTS	MD	301	925 4432	.40	1	2	1		3113102
-8 16	BRKLYN NYC	NY	212	287 4840	.55	1	2	1		31131055
-8 16	BRKLYN NYC	NY	212	287 4840	1.10	1	2	2		31103210
-8 17	FROM BALTO	MD	301	664 0568	2.36	R	1	1		3113102
	CAPITOL HTS	MD	301	925 4432						
FED.	TAXES	2.45		TOTAL	26.93					

FILE TAXES DAILY CALLS	AREA	TELEPHONE NO.	AMOUNT	EXT.	NO.	DATE	TIME
8218CAPITCLHTS MD	301	9254432	70	10	1	1022	
822BRLYN NYC NY	212	2276660	55	10	2	1022	
824CAPITCLHTS MD	301	9254432	208	10	15	1022	
826CAPITCLHTS MD	301	9254432	50	10	2	1022	
903CAPITCLHTS MD	301	9254432	70	10	1	1022	
905QUEENS NYC NY	212	5512025	55	10	1	1022	
906CAPITCLHTS MD	301	9254432	115	10	10	1022	
TOTAL CARRIED TO BILL			612				
56	56	56	56				
FACE CALLED	56	56	56				

*Sept 11*



The C&P Telephone Company of Maryland

P. O. Box 657 Baltimore, Md. 21203

**DUPLICATE BILL**

	LOCAL	TAXES	FEDERAL	AMOUNT INCLUDING TAXES
YOUR BASIC MONTHLY SERVICE	1.30		1.07	2.37
ADDITIONAL MESSAGE UNITS				
CALLS AND TELEGRAMS				
DIRECTORY ADVERTISING				
CHARGES OR CREDITS (SEE REVERSE)				
BALANCE DEDUCT IF PAID				
TOTAL INCLUDING TAXES				14.57

PLEASE RETURN THE ATTACHED CARD AND PAY THIS AMOUNT

NAME <b>N. C. THURMAN</b>	
ADDRESS <b>508 HARRIS ST.</b>	
CITY <b>BALTIMORE</b>	
STATE <b>MD.</b>	
ZIP CODE <b>21203</b>	
CUSTOMER CODE <b>041</b>	DATE <b>12-15</b>
AMOUNT PAID <b>0.00</b>	
OTHER	
FINAL ACCOUNT	DATE <b>1/1</b>
NR	DATE <b>1/1</b>
NR	DATE <b>1/1</b>



PAGE NUMBER	DATE	PLACE	AIRFA	TELEPHONE NO.	AMOUNT	PERCENT	TAXES	NO.	NAME	STATUS	DATE
-5 10	BALLO		202	892 0657	2.76	0		201	65		
-5 10	WASHINGTON DC		202	892 0657	.30	1		201	65		
-5 10	WASHINGTON DC		202	892 0657	.30	1		201	65		
-5 10	WASHINGTON DE		202	892 0657	.30	1		201	65		
-5 24	LAUREL MD		301	725 2600	.30	0		201	65		
-5 30	BRIYH NYC NY		212	287 4640	2.30	1		201	65		
-6 5	LAUREL MD		301	725 3990	.70	0		201	65		
-6 8	PTONX NYC NY		212	994 5141	1.85	1		201	65		
-6 14	LAUREL MD		301	775 8794	.30	0		201	65		
-6 14	HAPRISBURG PA		717	238 6664	.40	1		201	65		
-6 18	LAUREL MD		301	776 8794	.30	0		201	65		
-6 18	LAUREL MD		301	776 8794	.30	0		201	65		
FED.				TOTAL	11.04						





Filed 8 October, 1970.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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No. 737 N—Misc.

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APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF AN ORDER  
AUTHORIZING THE INSTALLATION OF  
A DEVICE TO REGISTER TELEPHONE  
NUMBERS CALLED FROM THE  
TELEPHONE NUMBERED  
685-0211

ORDER

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice.

This matter having come on before the Court upon application of the United States through its attorneys, the United States Attorney for the District of Maryland George Beall and Assistant United States Attorneys and one Wayne A. Ambrose, Jr., a Special Agent of the Bureau of Narcotics and Dangerous Drugs for an order authorizing the use of a device to register telephone numbers called from the telephone subscribed by Nicholas Giordina and full consideration having been given to the matters set forth, the Court finds:

A. There is probable cause to believe that Nicholas Giordina of Baltimore, Maryland, within this District, is committing, and is about to commit, and is conspiring with other persons to commit, offenses involving the sale of narcotic drugs in violation of 21 U.S.C. 174, 26 U.S.C. 4704(a), and 26 U.S.C. 4705(a).

B. There is probable cause to believe that the telephone located at Apartment 1304, 8 Charles Plaza, Baltimore, Maryland, subscribed by Nicholas Giordina and carrying telephone number 685-0211 is being used and is about to be used by Nicholas Giordina, in connection

with the commission of the above mentioned offenses involving the use of communication facilities in committing, attempting to commit, or conspiring to commit narcotic offenses in violation of 18 U.S.C. 1403.

C. There is probable cause to believe that telephone numbers presently being called from the telephone subscribed to by Nicholas Giordina and carrying telephone number 685-0211 are being called by Nicholas Giordina and that these calls relate to narcotics transactions.

**WHEREFORE**, it is hereby ordered that:

Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized to:

Attach a device which will register the telephone numbers called from the telephone subscribed to by Nicholas Giordina and carrying number 685-0211.

**PROVIDING THAT**, this authorization to register telephone numbers called shall be executed as soon as practicable after signing this order, and must terminate in fourteen (14) days from the date of this order.

**PROVIDING ALSO**, that Assistant United States Attorneys for the District of Maryland, shall provide the Court with a report on the 5th and 10th days following the date of this order, showing what progress has been made toward achievement of the authorized objectives.

It is further **ORDERED** that this Order be sealed and that two (2) certified copies thereof be issued to Special Agent Wayne A. Ambrose, Jr. of the Bureau of Narcotics and Dangerous Drugs.

8th Oct. 1970.

**DATE**

/s/ Edward S. Northrop  
U. S. District Judge

I hereby attest and certify on 5-15-72 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

/s/ Paul R. Schlitz

Clerk, U. S. District Court,  
District of Maryland

By August Cage, Deputy

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MARYLAND

---

MISCELLANEOUS DOCKET No. 739

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APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF AN ORDER  
AUTHORIZING THE INTERCEPTION OF  
WIRE COMMUNICATIONS

Francis S. Brocato, Assistant U.S. Attorney for the District of Maryland, being duly sworn, states:

This sworn application is submitted in support of an order authorizing the interception of wire communications.

This application has been submitted only after lengthy discussion concerning the necessity for such an application with agents of the Bureau of Narcotics and Dangerous Drugs.

1. He is an "investigative or law enforcement officer—of the United States", within the meaning of Section 2510(7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

3. This application seeks authorization to intercept wire communications of Nicholas Giordina and others as yet unknown, concerning offenses enumerated in Section 2516 of Title 18, United States Code—that is, offenses involving the receiving, concealing, buying, and selling of illegal narcotic drugs, and the purchase, sale, or dispensing of narcotic drugs which are not in or from the original stamped package, and the sale or exchange of narcotic drugs without written order forms in violation, respectively, of 21 USC § 174 and 26 USC §§ 4704(a), 4705(a) and 7237(a) and (b), and conspiracy to violate the afore-said offenses, which have been committed and are being committed by Nicholas Giordina and others as yet unknown.

4. He has discussed all the circumstances of these offenses with Special Agent Wayne A. Ambrose of the Baltimore, Maryland Office of the Bureau of Narcotics and



Dangerous Drugs who has conducted the investigation herein and has examined the affidavits of Special Agent Wayne A. Ambrose and Group Supervisor Abraham L. Azzam (attached to this application as Exhibits B and C, and incorporated by reference herein) which allege the facts therein in order to show that:

(a) There is probable cause to believe that Nicholas Giordina and others as yet unknown, have committed, and are committing, offenses involving the receiving, concealing, buying, and selling of illegal narcotic drugs, and the purchase, sale, or dispensing of narcotic drugs which are not in or from the original stamped package, and the sale or exchange of narcotic drugs without written order forms in violation, respectively, of 21 USC §174 and 26 USC §§4704(a), 4705(a), and 7237(a) and (b), and conspiracy to violate the aforesaid offenses.

(b) there is probable cause to believe that wire communications concerning these offenses will be obtained through the interception, authorization for which is herein applied for. In particular these wire communications will be between Nicholas Giordina and his suppliers concerning: (1) the date, time, place, and manner in which illegal narcotic drugs will be delivered to Nicholas Giordina, and (2) the price Nicholas Giordina is to pay for the illegal narcotic drugs and the date, time, place, and manner of payment for said drugs. Also, these wire communications will be between Nicholas Giordina and his buyers concerning: (1) the date, time, place, and manner in which Nicholas Giordina will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers, and (2) the price Nicholas Giordina is to receive for the narcotic drugs, and the date, time, place, and manner of payment for said drugs.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the telephone listed in the name of Nicholas Giordina and located

at Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, and carrying the telephone number (301) 685-0211, has been used, is being used and will be used, in connection with the commission of the offenses described above and is commonly used by Nicholas Giordina and others as yet unknown.

5. No other application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Nicholas Giordina and others as yet unknown are engaged in the commission of the above-described offenses, and that they have used, and are using the telephone listed in the name of Nicholas Giordina, and located at Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, and bearing the telephone number (301) 685-0211, in connection with the commission of those offenses, that communications concerning these offenses will be intercepted to and from that telephone, and that normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant herewith requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications to and from the above-mentioned telephone until communications are intercepted which reveal the details of the scheme which has been used by Nicholas Giordina and others as yet unknown to receive, conceal, buy, and sell illegal narcotic drugs, and the identity of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty-one (21) days from the date of that order, whichever is earlier.

/s/ Francis S. Brocato

Subscribed and sworn to before me this 16th day of October, 1970.

/s/ Edward S. Northrop  
Chief Judge, U. S. District Court

I hereby attest and certify on October 19, 1970 that the foregoing document is a full, true and correct copy of the original on file in my office in my legal custody.

/s/ Paul R. Schlitz  
Clerk

/s/ M. A. Heinzerling  
Deputy Clerk

October 16, 1970

[Exhibit A]

Mr. Francis S. Brocato  
Assistant United States Attorney  
Baltimore, Maryland

Dear Mr. Brocato:

This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications to and from telephone number 301-685-0211, located at 8 Charles Plaza, Apartment 1304, Baltimore, Maryland, in connection with the investigation into possible violations of 21 U.S.C. 174 and 26 U.S.C. 4704(a), 4705(a) and 7237(a) and (b) by Nicholas Giordina and others as yet unknown.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Nicholas Giordina and others as yet unknown have committed, are committing, or are about to commit offenses enumerated in Section

2516 of Title 18, United States Code, to wit: violations of 21 U.S.C. 174 and 26 U.S.C. 4704(a), 4705(a) and 7237 (a) and (b). I have further determined that there exists probable cause to believe that the above person makes use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications from the facility described above, for a period of twenty-one (21) days.

Sincerely,

WILL WILSON

Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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MISCELLANEOUS DOCKET No. 739

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APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF AN ORDER  
AUTHORIZING THE INTERCEPTION OF  
WIRE COMMUNICATIONS

[Exhibit B]

AFFIDAVIT

WAYNE A. AMBROSE, JR., being duly sworn, states:

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs (BNDD), United States Department of Justice, and a "law enforcement officer" within the meaning of 18 USC §2510(7). I am in charge of and fully familiar with the investigation pending in our Bureau of the narcotic wholesale smuggling and trafficking activities of Nicholas Giordina, aka Nick, and unknowns.

2. This affidavit is submitted in support of an application for an order authorizing the interception of wire communications of Nicholas Giordina and others to and from 8 Charles Plaza, Apt. 1304, Baltimore, Maryland, telephone number (301) 685-0211, subscribed to by Nicholas Giordina, within the jurisdiction of the United States District Court for the District of Maryland. The type of communications sought to be intercepted are the details of a system of importation of illegal narcotic drugs into the Baltimore, Maryland, area and the receiving, concealing, sale, and distribution of these drugs throughout the Baltimore, Maryland, area; and the dates, places, and identities and roles of the persons involved in committing these offenses, in violation of 21 USC §174, 26 USC §4705(a); §4704(a) and §7237. The period for which interception is sought is twenty-one (21) days in view of the complex and continuing nature of the system and the difficulties in identifying its activity or major participants, as demonstrated by the facts set forth in this affidavit below.

3. The affidavit in support of this application will take the following form:

A. Nicholas Giordina: The narcotic traffic of the subject of this investigation, dealing first with his general narcotic activity as revealed by sources and surveillance, and then particularly with his use of the telephone (301) 685-0211 in order to transact this illegal business.

B. Long-Distance Toll Record Information

C. Pen Register Information

D. Unavailability of other means of investigation: The limited success and limited potential of other means of investigating this operation.

*I. Nicholas Giordina*

Nicholas Giordina has been the main subject of BNDD investigation since September, 1970. Giordina resides at Apt. 1304, 8 Charles Plaza, Baltimore, Md. and subscribes to telephone number (301) 685-0211.

A source of information, SE-1, was developed by Baltimore Agents, BNDD, on September 24, 1970. On October 1, 1970, SE-1 stated to your affiant that on that date (October 1, 1970), Giordina gave him telephone number (301) 685-0211 and told this source of information to call him at his telephone number when he wished to transact narcotics business. Also, on October 1, 1970, SE-1 stated to your affiant that Giordina had given him (SE-1) number (301) 685-0211 approximately six (6) months prior to October 1, 1970 and that Giordina then asked SE-1 to transact narcotics business at that time. On October 2, 1970, a source of information made a telephone call to telephone number (301) 685-0211. A man known to the source of information as Giordina answered the phone. This source of information asked Giordina if he could obtain  $\frac{1}{8}$  kilo of Heroin. Giordina stated that he would be ready to do business on Monday, October 5, 1970. This call was corroborated by Special Agent Wayne A. Ambrose, Jr., in that Special Agent Ambrose personally monitored this telephone call with the permission of the source of information.

On October 5, 1970 at 7:10 a.m., this source of information made a telephone call to telephone number (301) 685-0211. A man known to the source of information as Giordina answered the phone. This source of information asked Giordina if he could get  $\frac{1}{8}$  kilo of Heroin. Giordina stated that he would be ready to do business at 7:00 p.m. This telephone call was corroborated by Special Agent Ambrose in that Special Agent Ambrose personally monitored this telephone call with the permission of the source of information.

On October 5, 1970, at 7:00 p.m., this source of information made a telephone call to telephone number (301) 685-0211. A man known to the source of information as Giordina answered the telephone. This source of information asked Giordina if he had the  $\frac{1}{8}$  kilo of Heroin. Giordina stated that he did. The source of information told Giordina that he would meet him in front of 7 Saratoga Street, Baltimore, Md. Giordina stated that he would see him there. This telephone call was corroborated by Special Agent Ambrose in that Special Agent Ambrose personally monitored this telephone call with the permission of the source of information. About 7:30 p.m. on October 5, 1970, Special Agent Glenn C. Brown, BNDD, working in an undercover capacity, and the above-mentioned source of information, SE-1, and under the observation of Special Agent Ambrose and Special Agent Richard L. Jacob, purchased approximately 110 grams of Heroin (39% pure—according to an analysis conducted by BNDD Forensic Chemist Allan W. Fein) from Nicholas Giordina. This Heroin was not sold to Special Agent Brown in or from the original stamped packaged as required by 26 USC §4704(a), and the sale of this Heroin to Special Agent Brown was not made pursuant to a written order as required by 26 USC §4705(a).

BNDD, Baltimore, records indicate that average retail sales involve Heroin of 5% to 6% purity. The only BNDD documented Baltimore transaction of wholesale traffic in Heroin, approaching the purity of the Heroin involved in the Giordina transaction, involved the seizure of  $\frac{1}{2}$  oz. of Heroin which was 34% pure; that transaction occurred on June 4, 1970. It involved a seizure by BNDD Special Agents and the source of that Heroin was traced to New York City. BNDD, Baltimore, records do not indicate any known wholesale transactions, other than the one involving Giordina, which even approach  $\frac{1}{8}$  kilo of Heroin in amount.

A background check of Nicholas Giordina indicated that he was last employed approximately  $1\frac{1}{2}$  years ago to Goldbloom's Men's Store, 4 W. North Avenue, Balto., Mary-

land. He has no presently ascertainable regular employment. His apartment consists of 2 bedrooms with living-room and bath, renting at approximately \$300 per month.

On October 1, 1970, SE-1 stated to your affiant that he has known Giordina about eleven (11) years. SE-1 also stated to your affiant on October 1, 1970 that Giordina told him that he used to live in New York City, New York. SE-1 stated that he personally knew that Giordina was involved in gambling, lottery and stolen goods, besides his involvement in narcotics. SE-1 stated that about six months ago, Giordina approached him (SE-1) and asked SE-1 to distribute Heroin and Cocaine in the Baltimore, Maryland, area. Giordina also told him that he wanted to do a big volume of business and would not sell anything in less than  $\frac{1}{8}$  kilos. Giordina told SE-1 that he could obtain either Heroin or Cocaine. Giordina gave SE-1 telephone number (301) 685-0211, and told him to call this number when he wished to transact any narcotics business.

Toll records of the C&P Telephone Company have been obtained by subpoena for telephone number (301) 685-0211 for the months of May, 1970, through September, 1970, and are attached as Exhibit 1. These records indicate a total of 76 long distance calls placed from (301) 685-0211 during this time.

Telephone number (301) 685-0211, subscribed to by Giordina, called telephone number (202) 882-5906 seven times during this period of time. Telephone number (202) 882-5906 is listed to Felicia Woods, 30 Sheridan Street NE, Washington, D.C. This is an unpublished number. This is the residence of Joyce J. Jones, alias Bulldyke Joyce, and Betty Kiah. Jones and Kiah are well known narcotic violators in the Washington, D.C. area and are well documented in Bureau of Narcotics and Dangerous Drugs Cases E2-68-0013 and E1-69-0009. Jones is a Negro female, born August 5, 1941, and has FBI No. 32-662D and MPD No. 166979. Kiah is a Negro female, born October 3, 1948, and has MPD No 229-704. Both Jones and Kiah have been arrested several times by the Bureau



of Narcotics and Dangerous Drugs and the Metropolitan Police Department for violation of the Federal Narcotic Laws. These cases have not yet been brought to trial.

Toll records of the C & P Telephone Company have been obtained by subpoena for telephone number (202) 882-5906. Said records show that 26 calls have been made from Jones and Kiah's residence to the residence of Snyder Blanchard (367-0851, number subsequently changed to 367-6466), BNDD Case No. E1-69-0009, and McKinley Richardson, (523-0118) BND Case No. E1-69-0007. Both Blanchard and Richardson are major narcotic violators in the Baltimore, Maryland area and are well documented by the Bureau of Narcotics and Dangerous Drugs case files referred to above.

Telephone number (301) 685-0211, subscribed to by Giordina, called telephone number (202) 882-0657, listed to Mrs. Doris E. Jones. 640 Rock Creek Church Road NW, Washington, D.C. Doris Jones was living with Joyce Jones, alias Bulldyke Joyce, in 1963 as documented in Washington District BNDD files. Doris Jones is mentioned as an associate of Vincent A. Washington in Washington, D.C. BNDD Case No. E2-70-0003. Washington is a well known narcotics violator in the Washington, D.C. area as is documented in BNDD No. E2-70-0003. This number was called three times.

A total of nineteen (19) calls have also been made to New York City, New York. A total of twenty-seven (27) calls have been made to telephone number (301) 925-4432. This telephone number is listed to Rufus F. Johnson, 709 65th Avenue, Seat Pleasant, Maryland. Johnson has no record with BNDD, MPD or Prince George's County Police. Also, nine (9) telephone calls have been made to (202) 667-7237 listed to Maybelle Williams, 744 Girard Street NW, Apt. 301, Washington, D.C.

### III.

#### *Pen Register Information*

On October 8, 1970, the undersigned applied to the Honorable Edward S. Northrop of the U.S. District

Court for the District of Maryland for an order authorizing the installation of a device to register telephone number (301) 685-0211. An order authorizing this activity was issued on the same day for a period of fourteen (14) days. The register device became operational on October 8, 1970, approximately 5:00 p.m. From the period of 5:00 p.m. on October 8, 1970 to 5:00 p.m. on October 9, 1970, the following results were obtained:

A total of approximately fifty (50) incoming telephone calls have been made to telephone number (301) 685-0211. A "pen register device" does not allow the tracing of the source of incoming calls. From the period of 5:00 p.m. on October 8, 1970 to 5:00 p.m. on October 9, 1970, four (4) outgoing calls were made from telephone number (301) 685-0211. A telephone call from (301) 685-0211 was made to telephone number 566-1455, listed to George L. Wilson, 4634 Rokeby Road, Baltimore, Maryland. Wilson is a Negro male, born August 3, 1934. Wilson has FBI No. 704-867D and Baltimore City Police Identification No. 111-997. Wilson was arrested by the Baltimore City Police Department on October 11, 1966 for investigation of narcotics.

From the period 5:01 p.m., Friday, October 9, 1970 to 1:59 p.m., Sunday, October 11, 1970, approximately 30 calls were made to telephone number (301) 685-0211. No outgoing calls were made from telephone number (301) 685-0211 during the above period. The "pen register device" does not indicate whether incoming calls are answered. On October 8, 1970, SE-1 stated to your affiant that Giordina had advised SE-1 on October 8, 1970 that he (Giordina) would be out of town during the weekend of October 10-11, 1970 in order to receive additional supplies of narcotics.

From the period 2:00 p.m., October 11, 1970, to 4:30 a.m., October 12, 1970, approximately 69 outgoing calls were made from telephone number (301) 685-0211. Number 685-0211 called number 566-1455 once in addition to the call referred to above. Number 685-0211 called telephone number 685-8439, listed to Herman Lee Pettiford,

aka Skeezie, 1432 N. Eden Street, Baltimore, Maryland. (685-0211 called 685-8439 nine (9) times). Pettiford is a Negro male, born June 28, 1945. Pettiford has Baltimore City Police Department No. 133-703 and BNDD Case No. E1-68-00014 (Title James T. Wescott, et al.). Pettiford has been arrested by Baltimore City Police several times. Pettiford is presently enlarged on appeal bond after receiving a 5 year sentence, by the Criminal Court of Baltimore City, for possession of Heroin. Number 685-0211 called telephone number 542-5270, listed to John Bass, aka Cookie, 3326½ Woodland Avenue, Apt. 1A, Baltimore, Md. (685-0211 called telephone number 542-5270 four (4) times). On September 24, 1970, SE-1 informed your affiant that Bass had sold narcotics to SE-1 on numerous occasions, in the past, the most recent dates being during July, 1970 (two (2) sales).

#### IV.

##### *Unavailability of Other Methods of Investigation*

Methods of investigation other than wire intercept and limited undercover penetration have proven insufficient in the past to identify and build successful prosecution against the major figures in the Giordina narcotics distribution system in the Baltimore, Maryland area, and hold small potential as well in the future, for the following reasons:

A. Criminal records checks on Giordina with the Maryland State Police, Baltimore City Police Department, Baltimore County Police Department, Baltimore Regional Office, and New York Regional Office, BNDD and the New York City Police Department have met with negative results.

B. A check with the Maryland State Credit Bureau of Baltimore failed to disclose any information on Giordina.

C. A check with the Baltimore Gas and Electric Company failed to disclose any information on Giordina.

D. A subpoena was issued to the C & P Telephone Company of Maryland, and the Telephone Company revealed that telephone number (301) 685-0211 was listed to Nicholas Giordina, Apt. 1304, 8 Charles Plaza, Baltimore, Maryland. The Telephone Company could provide no other information other than the fact that this phone was installed in October, 1969.

E. Giordina lives in Apartment 1304, 8 Charles Plaza, Baltimore. This building is a highrise apartment house located between Charles and Liberty Streets, and Saratoga and Baltimore Streets, Baltimore, Maryland. Eight Charles Plaza is located in a complex, and the buildings known as Charles Plaza consist of stores, shops, theaters, and other establishments. There are two main entrances to 8 Charles Plaza which remain locked at all times, and under security guard, with a television monitoring system. There are other means of egress from and ingress to the apartment complex through underground garages. The nature of this arrangement makes effective surveillance of Giordina almost impossible. Full scale surveillance by BNDD has been attempted from October 5 to date. It has met with very limited success. Effective surveillance would be impossible without the knowledge and active aid of apartment security guards. Giordina is an individual well known to apartment security guards and they could not be informed of BNDD surveillance without compromising the investigation. The "pen register" documents a number of calls from 685-0211 to the apartment security desk.

F. A check with the Maryland State Department of Motor Vehicles for a driver's license or a vehicle listed to Giordina have also met with negative results.

G. Only one informant, SE-1, has been developed who has had dealings with Giordina. SE-1 is not a confidant of Giordina and SE-1 only purchases narcotics from him. It is not possible for SE-1 to attempt to infiltrate Giordina's organization without arousing suspicion.

H. Other individuals both referred to in this affidavit and not referred to herein, who are connected with

Giordina, cannot be approached to give information with regard to Giordina without the danger of them informing him of the pendency of a BNDD investigation.

I. Giordina's organization cannot be infiltrated by BNDD undercover agents since, according to SE-1, Giordina will deal only with selected purchasers whose backgrounds are known to him. (See Azzam Affidavit and see reference to sale of  $\frac{1}{8}$  kilo of Heroin by Giordina on October 5, 1970). S/A Brown, posing as SE-1s customer, received Heroin from Giordina through SE-1 as the intermediary. Giordina would not deal directly with S/A Brown, nor would he meet Brown.

J. The "pen register" has shown so far that Giordina receives numerous incoming calls. Without a wire intercept, it would be nearly impossible to identify the individuals making these incoming calls, from whom these narcotics are coming, how, where, when and by what method they are locally distributed.

K. Toll call records, referred to in this affidavit, show numbers called in Washington, D.C. and New York, N.Y. Toll calls to numbers subscribed to by individuals connected with narcotics dealing are referred to in this affidavit. Such calls are few in number. The great majority of Washington, D.C. toll calls and all New York area toll calls are to numbers, subscribed to by individuals, mostly female, a background check of whom in BNDD, MPD and NY PD files has proved negative. (See Azzam affidavit describing MO of major narcotics wholesalers who attempt to insulate themselves by never calling their suppliers directly, but who choose "clean" third parties, almost invariably female, with whom they leave messages or receive messages for their suppliers to meet them or call them).

L. Unless electronic surveillance were instituted for number (301) 685-0211, further investigation of Giordina could not progress. He would be arrested, but knowledge of his course of supply and method of distribution would be almost totally lacking.

I have not, nor has anyone to my knowledge, made any previous application for authorization to intercept wire or oral communication from the described premises or from any other facilities in connection with this investigation.

WHEREFORE, your affiant believes that probable cause exists to believe that Nicholas Giordina and other persons are engaged in the commission of offenses involving the importation, receipt, concealment, sale and distribution of narcotics, and conspiracy to do so; that Nicholas Giordina uses the premises Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, in this district and within the jurisdiction of this Court to conduct this activity; that he has used and will continue to use the telephone numbered (301) 685-0211 at this premises in the conduct of this activity; that further communications concerning these offenses will take place over this telephone and will be obtained through the interception of these wire communications; and that no other investigative procedures appears likely to succeed.

/s/ Wayne A. Ambrose, Jr.

Special Agent

Bureau of Narcotics and Dangerous Drugs

Subscribed and Sworn to before me, this 16th day of October, 1970.

/s/ Edward S. Northrop, Chief Judge

U. S. District Court for the District of Maryland

I hereby attest and certify on October 19, 1970 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

M. A. Heinzerling, Deputy  
Deputy Clerk



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0200	10.0	0.0	0.0	0.0	0.0	0.0	0200
0300	10.0	0.0	0.0	0.0	0.0	0.0	0300
0400	10.0	0.0	0.0	0.0	0.0	0.0	0400
0500	10.0	0.0	0.0	0.0	0.0	0.0	0500
0600	10.0	0.0	0.0	0.0	0.0	0.0	0600
0700	10.0	0.0	0.0	0.0	0.0	0.0	0700
0800	10.0	0.0	0.0	0.0	0.0	0.0	0800
0900	10.0	0.0	0.0	0.0	0.0	0.0	0900
1000	10.0	0.0	0.0	0.0	0.0	0.0	1000
1100	10.0	0.0	0.0	0.0	0.0	0.0	1100
1200	10.0	0.0	0.0	0.0	0.0	0.0	1200
1300	10.0	0.0	0.0	0.0	0.0	0.0	1300
1400	10.0	0.0	0.0	0.0	0.0	0.0	1400
1500	10.0	0.0	0.0	0.0	0.0	0.0	1500
1600	10.0	0.0	0.0	0.0	0.0	0.0	1600
1700	10.0	0.0	0.0	0.0	0.0	0.0	1700
1800	10.0	0.0	0.0	0.0	0.0	0.0	1800
1900	10.0	0.0	0.0	0.0	0.0	0.0	1900
2000	10.0	0.0	0.0	0.0	0.0	0.0	2000
2100	10.0	0.0	0.0	0.0	0.0	0.0	2100
2200	10.0	0.0	0.0	0.0	0.0	0.0	2200
2300	10.0	0.0	0.0	0.0	0.0	0.0	2300
2400	10.0	0.0	0.0	0.0	0.0	0.0	2400

80 AB-997	FROM TELAV IV	8 DO 1661			
		1 14			
		3 ON			
		3 VC			
		4-113 CASH			
		2.00P			
8-2	8-1	IS	MU	C	DA
CAF	MAJ	1303	512		

9464 .101

[illegible]

4966 . 101 .

PLATE	PLATE NO.
1. 100	1. 100
2. 100	2. 100
3. 100	3. 100
4. 100	4. 100
5. 100	5. 100







## CALLS AND TELEGRAMS

NUMBER		DATE		PLACE		CALLED		AREA	TELEPHONE NO.		AMOUNT	CP	DETAIL	TIME	CLASS	MAIL	MIS	RAD-TELE	TELEPHONE NUMBER
2		-7-10-70		-7-10-70		-7-10-70		202	651	7237	.50	1	1	1	7	A	1		301 684 3211
-7	11	WASHINGTON DC		WASHINGTON DC		WASHINGTON DC		212	651	2025	.50	1	1	1	7	A	1		301 684 3211
-7	11	QUEEN'S NYC NY		QUEEN'S NYC NY		QUEEN'S NYC NY		202	657	7237	.25	1	1	1	7	A	1		301 684 3211
-7	11	WASHINGTON DC		WASHINGTON DC		WASHINGTON DC		301	925	4432	.40	1	1	1	7	A	1		301 684 3211
-7	11	CAPITOL HTS MD		CAPITOL HTS MD		CAPITOL HTS MD		202	882	5025	.25	1	1	1	7	A	1		301 684 3211
-7	12	WASHINGTON DC		WASHINGTON DC		WASHINGTON DC		212	651	2025	.50	1	1	1	7	A	1		301 684 3211
-7	12	QUEEN'S NYC NY		QUEEN'S NYC NY		QUEEN'S NYC NY		212	651	2025	.50	1	1	1	7	A	1		301 684 3211
-7	12	QUEEN'S NYC NY		QUEEN'S NYC NY		QUEEN'S NYC NY		212	651	2025	.50	1	1	1	7	A	1		301 684 3211
-7	12	CAPITOL HTS MD		CAPITOL HTS MD		CAPITOL HTS MD		301	925	4432	.40	1	1	1	7	A	1		301 684 3211
-7	12	CAPITOL HTS MD		CAPITOL HTS MD		CAPITOL HTS MD		301	925	4432	.78	1	1	1	7	A	1		301 684 3211
-7	16	CAPITOL HTS MD		CAPITOL HTS MD		CAPITOL HTS MD		301	925	4432	.40	1	1	1	7	A	1		301 684 3211
-7	15	CAPITOL HTS MD		CAPITOL HTS MD		CAPITOL HTS MD		301	925	4432	.25	1	1	1	7	A	1		301 684 3211
-7	16	WASHINGTON DC		WASHINGTON DC		WASHINGTON DC		202	657	7237	.22	1	1	1	7	A	1		301 684 3211
-7	16	CAPITOL HTS MD		CAPITOL HTS MD		CAPITOL HTS MD		301	925	4432	.22	1	1	1	7	A	1		301 684 3211

AREA	TELEPHONE NO.	AMOUNT	MIN	SEC	CHG
821 CAPITCLHTS MD	3010254432	61.2	10	00	00
822 BKLYN NYC NY	2122074440	1.5	15	00	00
824 CAPITCLHTS MD	3010254432	2.08	15	00	00
826 CAPITCLHTS MD	3010254432	1.50	15	00	00
803 CAPITCLHTS MD	3010254432	1.00	10	00	00
909 QUEENS NYC NY	2125512025	1.55	15	00	00
906 CAPITCLHTS MD	3010254432	1.15	10	00	00
FED. TAXES					
DIALED					
CALLS					
56 TOTAL CARRIED TO BILL					
PUCE CALLED					
AIR					
ONE					

MOORE BUSINESS FORMS, INC. - 74

(7-66) 9647

**The C&P Telephone Company of Maryland**  
P. O. Box 657 Baltimore, Md. 21203

**DUPLICATE BILL**

BILL DATE

9/19/74

LOCAL TAXES

FEDERAL TAXES

AMOUNT INCLUDING TAXES

1.30

1.87

1.30

6.15

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

1.11

YOUR BASIC MONTHLY SERVICE

ADDITIONAL MESSAGE UNITS

CALLS AND TELEGRAMS

DIRECTORY ADVERTISING

CHARGES OR CREDITS (SEE REVERSE)

BALANCE, DEDUCT IF PAID

TOTAL INCLUDING TAXES

NAME <b>N. C. THORNTON</b>		ADDRESS <b>801 HARRIS BL</b>	
CITY <b>BALTIMORE</b>		STATE <b>MD</b>	
COUNTRY <b>USA</b>		BILL CODE <b>01</b>	
CUSTOMER CODE <b>041</b>		AMOUNT PAID <b>31.35</b>	
DATE <b>9/19/74</b>		OTHER <b></b>	
FINAL ACCOUNT		BILL CODE	

PLEASE RETURN THIS ATTACHED CARD TO AN INDIVIDUAL WITH THIS AMOUNT

[illegible]

## CALLS AND TELEGRAMS

PAGE  
NUMBER

BILL DATE

8-19-70

TELEPHONE  
NUMBER

201 895 9711

AREA  
CODE

201

DATE	PLACE	CALLS	AREA	TELEPHONE NO.	AMOUNT	CAPITALS	MIN	SEC	MIN	SEC	TELEPHONE NUMBER
-7 20	WASHINGTON DC		202	667 7237	.35	1	1	1	1	1	1024
-7 20	WASHINGTON DC		202	667 7237	.35	1	1	1	1	1	1024
-7 21	CAPITOL HTS MD		301	925 4432	2.64	8	1	1	1	1	1024
-7 21	WASHINGTON DC		202	802 5906	.35	1	1	1	1	1	1024
-7 21	WASHINGTON DC		202	887 5906	.45	1	1	1	1	1	1024
-7 21	WASHINGTON DC		202	667 7237	.35	1	1	1	1	1	1024
-7 25	CAPITOL HTS MD		301	925 4432	2.22	8	1	1	1	1	1024
-7 26	CAPITOL HTS MD		301	925 4432	2.39	8	1	1	1	1	1024
-8 2	WASHINGTON DC		202	667 7237	.35	1	1	1	1	1	1024
-8 2	WASHINGTON DC		202	667 7237	.35	1	1	1	1	1	1024
-8 6	CAPITOL HTS MD		301	925 4432	3.76	8	1	1	1	1	1024
-8 11	CAPITOL HTS MD		301	925 4432	1.66	8	1	1	1	1	1024
-8 13	CAPITOL HTS MD		301	925 4432	.40	8	1	1	1	1	1024
-8 14	CAPITOL HTS MD		301	925 4432	3.90	8	1	1	1	1	1024

HOTEL GUEST

C-PARTIAL CREDIT  
APPLIED  
TO ACCOUNTING CALL1011111111  
1011111111  
1011111111ACCOLLECT  
BANKRUPTCY  
BANKRUPTCYU.S. ACTION DAY  
U.S. ACTION DAY  
U.S. ACTION DAYU.S. ACTION DAY  
U.S. ACTION DAY  
U.S. ACTION DAYU.S. ACTION DAY  
U.S. ACTION DAY  
U.S. ACTION DAYU.S. ACTION DAY  
U.S. ACTION DAY  
U.S. ACTION DAYU.S. ACTION DAY  
U.S. ACTION DAY  
U.S. ACTION DAY

## CALLS AND TELEGRAMS

PAGE  
NUMBER

2

REL DATE

8-19-70

AREA  
CODE

201 605 (2) 1

TELEPHONE  
NUMBER

301 516 30

DATE	PLACE	CALLED	AREA	TELEPHONE NO	AMOUNT	CD	STRT	DEPT	CLASS	REL	WM	PAGE	TELEPHONE NUMBER
-8 15	BRKLYN NYC	NY	212	287 4340	.55	1	1	2	2	2	2	301 516 30	
-8 15	CAPITOL HTS MD	MD	301	925 4432	.40	9	1	2	1	1	1	301 516 30	
-8 16	BRKLYN NYC	NY	212	287 4340	.55	1	1	2	2	2	2	301 516 30	
-8 16	BRKLYN NYC	NY	212	287 4340	1.10	1	2	4	2	2	2	301 516 30	
-8 17	FROM DALTON MD	MD	301	664 0568	2.36	0	1	1	1	1	1	301 516 30	
	CAPITOL HTS MD	MD	301	925 4432	26.93								
FED.	TAXES	2.45		TOTAL									



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

MISC. No. 739

APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF AN ORDER  
AUTHORIZING THE INTERCEPTION OF  
WIRE COMMUNICATIONS

AFFIDAVIT  
[Exhibit C]

ABRAHAM L. AZZAM, being duly sworn, states

1. I am a Group Supervisor of the Bureau of Narcotics and Dangerous Drugs (BNDD), United States Department of Justice, and a "law enforcement officer" within the meaning of 18 USC § 2510(7).

2. I have full knowledge of the facts and details contained in an affidavit of Special Agent Wayne A. Ambrose, Jr., BNDD, who is charged with the investigation of one, Nicholas Giordina, and that the affiant has overall supervision of this investigation as Supervisor to Special Agent Wayne A. Ambrose, Jr., BNDD.

3. I have read the affidavit of Special Agent Wayne A. Ambrose, Jr. in support of an application for interception of wire communications of Giordina and others and I adopt the facts, details and conclusions of Special Agent Wayne A. Ambrose, Jr. as set forth in said affidavit which is attached.

4. My experience in law enforcement is as follows: 8 years as an Agent of BNDD, investigating more than 25 cases for violation of the Narcotic Laws each year, and having personally arrested more than 300 persons for violation of Narcotic Laws. From my experience, I conclude that the methods of Giordina, as observed and detailed in Special Agent Ambrose's affidavit have led me to believe that Giordina is a large wholesaler of narcotic drugs, Heroin and Cocaine, on an interstate level. Investigation of tolls obtained by subpoena from the C & P

Telephone Company indicates that, as other past violators have done, Giordina has called lower level known distributors of narcotic drugs, and that the phone subscribers of these telephones are females. Past experience shows that violators usually list telephones to females without criminal records in order to protect their own identity. Further, that being responsible for the overall investigation of Giordina, the affiant states that all ordinary and conventional methods of criminal investigation have failed to reveal and disclose the extent of Giordina's narcotic distribution operation in the Baltimore, Md., Washington, D.C., and New York, N.Y. areas.

5. On the basis of this affidavit and the affidavit of Special Agent Wayne A. Ambrose, Jr., BNDD, which the affiant wholly adopts, the affiant requests this Court to issue an order pursuant to 18 USC §2518 authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs of the U.S. Department of Justice, to intercept wire communications from the telephone of Nicholas Giordina, (301) 685-0211, at Baltimore, Md., for a period of 21 days from the effective date of this order.

/s/ Abraham L. Azzam  
Group Supervisor  
Bureau of Narcotics and Dangerous Drugs

Subscribed and sworn to before me this 16th day of October, 1970.

/s/ Edward S. Northrop, Chief Judge  
U.S. District Court for the  
District of Maryland

I hereby attest and certify on October 19, 1970 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

Paul R. Schlitz  
Clerk, U.S. District Court,  
District of Maryland

/s/ M. A. Heinzerling, Deputy  
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

Misc. No. 739N

APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF AN ORDER  
AUTHORIZING THE INTERCEPTION  
OF WIRE COMMUNICATIONS

ORDER

To: Special Agents of the Bureau of Narcotics and  
Dangerous Drugs, United States Department of  
Justice

Application under oath having been made before me by the United States through its Attorney, Francis S. Brocato, Assistant U.S. Attorney for the District of Maryland, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, and full consideration having been given to the matters set forth therein, the court finds:

(a) there is probable cause to believe that Nicholas Giordina and others as yet unknown, have committed, and are committing, offenses involving the receiving, concealing, buying, and selling of illegal narcotic drugs, and the purchase, sale, or dispensing of narcotic drugs which are not in or from the original stamped package, and the sale or exchange of narcotic drugs without written order forms in violation, respectively, of 21 USC § 174 and 26 USC §§ 4704(a), 4705(a), and 7237(a) and (b), and a conspiracy to violate the aforesaid offenses.

(b) there is probable cause to believe that wire communications concerning these offenses will be obtained through the interception, authorization for which is herein applied for. In particular, these wire communications will be between Nicholas Giordina and his suppliers

concerning: (1) the date, time, place, and manner in which illegal narcotic drugs will be delivered to Nicholas Giordina, and (2) the price Nicholas Giordina is to pay for the illegal narcotic drugs and the date, time, place, and manner of payment for said drugs. Also, these wire communications will be between Nicholas Giordina and his buyers concerning: (1) the date, time, place, and manner in which Nicholas Giordina will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers, and (2) the price Nicholas Giordina is to receive for the narcotic drugs, and the date, time, place, and manner of payment for said drugs.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the telephone listed in the name of Nicholas Giordina, and located at Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, and carrying the telephone number (301) 685-0211, has been used, is being used, and will be used, in connection with the commission of the offenses described above and is commonly used by Nicholas Giordina and others as yet unknown.

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to:

(1) intercept wire communications of Nicholas Giordina and others as yet unknown concerning the above-described offenses to and from the telephone listed in the name of Nicholas Giordina and located at Apt. 1304,

8 Charles Plaza, Baltimore, Maryland, and bearing the telephone number (301) 685-0211.

(2) such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the details of the scheme which has been used by Nicholas Giordina and others as yet unknown to receive, conceal, buy, and sell illegal narcotic drugs, and the identity of his confederates, their places involved therein, or for a period of twenty-one (21) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of twenty-one (21) days from the date of this order.

PROVIDING ALSO, that Francis S. Brocato, Assistant U.S. Attorney for the District of Maryland, shall provide the court with a report on the 5th, 10th, 15th and 21st day following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/ Edward S. Northrop  
Chief Judge, U.S. District Court

Date: 16th October 1970

I hereby attest and certify on October 19, 1970 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

Paul R. Schlitz  
Clerk, U.S. District Court,  
District of Maryland

/s/ M. A. Heinzerling, Deputy  
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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No. 739—Miscellaneous Docket

APPLICATION OF THE UNITED STATES OF AMERICA  
IN THE MATTER OF AN ORDER AUTHORIZING THE  
INTERCEPTION OF WIRE COMMUNICATIONS

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APPLICATION FOR AN AMENDED ORDER

Francis S. Brocato, Assistant United States Attorney for the District of Maryland, being duly sworn, states:

1. On October 16, 1970, this Court entered an Order authorizing, inter alia, the interception of wire communications of Nicholas Giordina and others as yet unknown concerning the violations of 21 U.S.C. § 174; 26 U.S.C. § 4704(a), 4705(a) and 7237(a)(b), and conspiracy to violate the aforesaid statutes. Interception of wire communication was authorized to and from the telephone listed in the name of Nicholas Giordina and located at Apartment 1304, 8 Charles Plaza, Baltimore, Maryland, and bearing the telephone number (301) 685-0211.

2. Francis S. Brocato has been informed by Group Supervisor Abraham L. Azzam, Region IV, Bureau of Narcotics and Dangerous Drugs, that the individual referred to as Nicholas Giordina, also known as Nick, in the Application, Affidavit and Order of Court to be filed in Miscellaneous Docket No. 739 has been positively identified by BNDD agents as Dominic Nicholas Giordano.

3. On October 19, 1970, Francis S. Brocato reviewed logs of electronic interception of telephone calls from telephone number (301) 685-0211. Logs of interceptions made on October 17, 1970, revealed that Giordano had arranged to change his telephone number; such change to be effective after the weekend of October 17-18, 1970. On October 19, 1970, Francis S. Brocato was informed by Group Supervisor Abraham L. Azzam, Region IV, BNDD, that Giordano had arranged to have the telephone number (301) 685-0211 disconnected and that,

upon information supplied to Azzam by C & P Telephone officials, Giordano will have a new number, i.e. (301) 685-2332, operating at his apartment, Apartment 1304, 8 Charles Plaza, Baltimore, Maryland, by October 20, 1970.

WHEREFORE, your affiant prays that so much of the Order entered by this Court on October 16, 1970, as refers to Nicholas Giordina and authorizes interception of wire communications to and from telephone number (301) 685-0211 be amended to refer to Dominic Nicholas Giordano, also known as Nicholas Giordina and Nick, and to authorize wire communications to and from telephone number (301) 685-2332.

/s/ Francis S. Brocato  
FRANCIS S. BROCATO  
Assistant United States Attorney  
for the District of Maryland

Subscribed and sworn to before me, this 20th day of October, 1970.

/s/ Edward S. Northrop  
EDWARD S. NORTHROP  
Chief Judge  
United States District Court  
for the District of Maryland

ORDERED AS PRAYED this 20th day of October, 1970.

/s/ Edward S. Northrop  
EDWARD S. NORTHROP  
Chief Judge  
United States District Court  
for the District of Maryland

TRUE COPY  
TEST:

PAUL R. SCHLITZ  
Clerk

By /s/ M. A. Hernzerling  
Deputy Clerk

**AFFIDAVIT IN SUPPORT OF EXTENSION OF A  
PEN REGISTER ON TELEPHONE NUMBER  
685-2332 IN THE DISTRICT OF MARYLAND**

Before me personally appeared this date Wayne A. Ambrose, Jr., Special Agent of the Bureau of Narcotics and Dangerous Drugs, who being first duly sworn, deposes and says that:

On October 8, 1970, United States District Judge Edward S. Northrop signed an Order authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs to install a device to register telephone numbers being called from telephone number 685-0211 in Baltimore, Maryland, and further authorizing the continuation of the installation of that device for a period not exceeding fourteen (14) days from the date of this Order.

On October 16, 1970, United States District Judge Northrop signed an Order authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs to intercept wire communications from telephone number (301) 685-0211. This telephone number is listed to Nicholas Giordano, Apartment 1304, 8 Charles Plaza, Baltimore, Maryland.

On October 17, 1970, approximately 113 grams of heroin were purchased from Giordano by Special Agent Glenn C. Brown. Also on October 17, 1970, the source of information, SE-1 (referred to in Exhibit 1), told your affiant that Giordano gave the source of information telephone number (301) 685-2332, and that Giordano told the source of information that his number was being changed and



that this was his new telephone number. Giordano told the source of information to call him at his new telephone number when he wished to transact any narcotic business.

On October 20, 1970, your affiant and Special Agent Steven G. Sabo served a subpoena on the C & P Telephone Company of Maryland regarding telephone number 685-2332. The records of the C & P Telephone Company show that on October 20, 1970, Nicholas Giordina (Giordano) had his telephone number changed from 685-0211 to telephone number 685-2332.

On October 20, 1970, the interception order referred to above was amended to authorize interception of communications to and from telephone number (301) 685-2332. The order was also amended to refer to Nicholas Giordina, also known as Nick, as Dominic Nicholas Giordano.

Attached hereto as Exhibit 1 and prayed to be incorporated herein is a copy of the Affidavit in Support of Installation of a Pen Register on Telephone Number 685-0211.

Attached hereto as Exhibit 2 and prayed to be incorporated herein are reports, prepared by your affiant, referencing numbers called by number (301) 685-0211 (number subsequently changed to (301) 685-2332).

Attached hereto as Exhibit 3 and prayed to be incorporated herein are logs of telephone conversations monitored pursuant to the order of this Court on October 16, 1970.

Your affiant re-asserts the facts set out in Exhibits 1 and 2. Your affiant further states that Exhibit 3 reveals continued use of the telephone located at Apartment 1304, 8 Charles Plaza, Baltimore, Maryland, for conversations regarding illegal trafficking in narcotics.

WHEREFORE, your affiant has probable cause to believe that telephone number 685-2332 listed to Nicholas Giordina, Apartment 1304, 8 Charles Plaza, Baltimore,

Maryland, is being used by Dominic Nicholas Giordano in illegal traffic in narcotics distribution in the Baltimore, Maryland, area.

/s/ Wayne A. Ambrose, Jr.  
Special Agent  
Bureau of Narcotics and Dangerous Drugs

Subscribed and sworn to before me this 22nd day of October, 1970.

/s/ Edward S. Northrop  
Chief Judge  
United States District Court

I hereby attest and certify on May 16, 1972, that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

/s/ Paul R. Schlitz  
Clerk, U. S. District Court,  
District of Maryland  
By August Cage, Deputy

Filed 23 October, 1970.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

MISCELLANEOUS DOCKET No. 737

APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF AN ORDER  
AUTHORIZING THE INSTALLATION OF  
A DEVICE TO REGISTER TELEPHONE  
NUMBERS CALLED FROM THE  
TELEPHONE NUMBERED

685-2332

ORDER

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon application of the United States, through its attorneys, George Beall, United States Attorney for the District of Maryland, and Francis S. Brocato, Assistant United States Attorney for said District, and one Wayne A. Ambrose, Jr., a Special Agent of the Bureau of Narcotics and Dangerous Drugs, for an Order authorizing the continuation of a device to register telephone numbers called from the telephone subscribed by Dominic Nicholas Giordina (Giordano) and full consideration having been given to the matters set forth, the Court finds:

A. There is probable cause to believe that Giordano of Baltimore, Maryland, within this District, is committing, and is about to commit, and is conspiring with other persons to commit, offenses involving the sale of narcotic drugs in violation of 21 U.S.C. § 174, 26 U.S.C. § 4704(a), and 26 U.S.C. § 4705(a).

B. There is probable cause to believe that the telephone located at Apartment 1304, 8 Charles Plaza, Baltimore, Maryland, subscribed by Nicholas Giordina (Dominic Nicholas Giordano) and carrying telephone number

(301) 685-2332 is being used and is about to be used by Giordano in connection with the commission of the above-mentioned offenses involving the use of communication facilities in committing, attempting to commit, or conspiring to commit narcotic offenses in violation of 18 U.S.C. § 1403.

C. There is probable cause to believe that telephone numbers presently being called from the telephone subscribed to by Giordano and carrying telephone number 685-2332 are being called by Giordano and that these calls relate to narcotics transactions.

WHEREFORE, it is hereby ordered that:

Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized to:

Continue in use a device which will register the telephone numbers called from the telephone subscribed to by Giordano and carrying number 685-2332.

PROVIDING THAT, this authorization to register telephone numbers called shall be executed as soon as practicable after signing this order, and must terminate in fifteen (15) days from the date of this Order.

PROVIDING ALSO, that Francis S. Brocato, Assistant United States Attorney for the District of Maryland, shall provide the Court with a report on the 5th and 10th days following the date of this Order, showing what progress has been made toward achievement of the authorized objectives.

IT IS FURTHER ORDERED that this Order be sealed and that two (2) certified copies thereof be issued to Special Agent Wayne A. Ambrose, Jr., of the Bureau of Narcotics and Dangerous Drugs.

/s/ Edward S. Northrop  
Chief Judge  
United States District Court

Dated: 22nd October, 1970.

I hereby attest and certify on May 16, 1972 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

/s/ Paul R. Schlitz  
Clerk, U. S. District Court,  
District of Maryland

By August Cage, Deputy

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

MISCELLANEOUS DOCKET No. 739N

APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF EXTENSION  
OF AN ORDER AUTHORIZING THE IN-  
TERCEPTION OF WIRE COMMUNICA-  
TIONS

Francis S. Brocato, Assistant U.S. Attorney for the District of Maryland, being duly sworn, states:

This sworn application is submitted in support of extension of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with agents of the Bureau of Narcotics and Dangerous Drugs (BNDD).

1. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize the affiant to make this application for extension of an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

3. This application seeks authorization to continue to intercept wire communications of Nicholas Giordina, a male alias Johnny Poo, Herman Lee Pettiford, Ronald Black-

well, a male alias Brooks, James Albert Williams, Stanley Silverstein, a male alias John, a male alias Roy, Michael Focarile and others as yet unknown, concerning offenses enumerated in Section 2516 of Title 18, United States Code—that is, offenses involving the receiving, concealing, buying, and selling of illegal narcotic drugs, and the purchase, sale, or dispensing of narcotic drugs which are not in or from the original stamped package, and the sale or exchange of narcotic drugs without written order forms in violation, respectively, of 21 USC § 174 and 26 USC §§ 4704(a), 4705(a) and 7237(a) and (b), and conspiracy to violate the aforesaid offenses which have been committed and are being committed by Nicholas Giordano, a male alias Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male alias Brooks, James Albert Williams, Stanley Silverstein, a male alias John, a male alias, Roy, Michael Focarile and others as yet unknown.

4. He has discussed all the circumstances of these offenses with Group Supervisor Abraham L. Azzam, Special Agent Wayne A. Ambrose, Jr. and other Special Agents of the Baltimore, Maryland Office of BNDD who have conducted the investigation herein and he has examined the affidavit of Group Supervisor Abraham L. Azzam (Attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Nicholas Giordano, a male alias Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male alias Brooks, James Albert Williams, Stanley Silverstein, a male alias, John, a male alias Roy, Michael Focarile and others as yet unknown, have committed and are committing, offenses involving the receiving, concealing, buying, and selling of illegal narcotic drugs, and the purchase, sale, or dispensing of narcotic drugs which are not in or from the original stamped package, and the sale or exchange of narcotic drugs without written order forms in violation, respectively, of 21 USC § 174 and 26 USC §§ 4704(a), 4705(a) and 7237(a) and (b), and conspiracy to violate the aforesaid offenses.

(b) there is probable cause to believe that wire communications concerning these offenses will be obtained through continuation of the interception of conversations to and from telephone number 301-685-2332, authorization for which is herein applied for. In particular, these wire communications will be between Nicholas Giordano and his suppliers (Michael Focarile and others as yet unknown) concerning: the date, time and place illegal narcotic drugs will be delivered to Nicholas Giordano. Also, these wire communications will be between Nicholas Giordano and his buyers (a male alias Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, James Albert Williams, Stanley Silverstein, a male alias Brooks, a male alias John, a male alias Roy and others as yet unknown, concerning: the date, time and place Nicholas Giordano will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the telephone listed in the name of Nicholas Giordano and located at Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, and carrying the telephone number 301/685-2332, has been used, and is being used and will be used, in connection with the commission of the offenses described above and is commonly used by Nicholas Giordano, a male alias Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male alias Brooks, John Albert Williams, Stanley Silverstein, a male alias John, a male alias Roy, Michael Focarile and others as yet unknown.

5. Application has been made to The Honorable Edward S. Northrop for authorization to intercept and for approval of interception of wire communications involving Nicholas Giordano and the facilities and places specified herein. Authorization was granted by The Honorable Edward S. Northrop on October 16, 1970.

WHEREFORE, your affiant believes that probable cause exists to believe that Nicholas Giordano, alias Johnny Poo,



Herman Lee Pettiford, Ronald Blackwell, alias Brooks, John Albert Williams, Stanley Silverstein, alias John, alias Roy, Michael Focarile and others as yet unknown are engaged in the commission of the above-described offenses, and that they have used, and are using the telephone listed in the name of Nicholas Giordano, and located at Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, and bearing the telephone number 301/685-2332, in connection with the commission of those offenses, that communications concerning these offenses will be intercepted to and from that telephone, and that normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant herewith requests this court to issue an Order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications to and from the above-described telephone until communications are intercepted which reveal the details of the scheme which has been used by Nicholas Giordano, a male alias Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male alias Brooks, John Albert Williams, Stanley Silverstein, a male alias John, a male alias Roy, Michael Focarile and others as yet unknown, to receive, conceal, buy and sell illegal narcotic drugs, and the identity of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the day of that Order, whichever is earlier.

/s/ Francis S. Brocato

Subscribed and sworn to before me this 6th day of November, 1970. At 5:20 p.m.

/s/ Edward S. Northrop  
Chief Judge, U.S. District Court

True copy

Test:

Paul R. Schlitz  
Clerk

/s/ M. A. Heinzerling  
Deputy Clerk

Mr. Francis S. Brocato  
Assistant United States Attorney  
Baltimore, Maryland

November 6, 1970

Dear Mr. Brocato:

This is with regard to your request for authorization pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Federal Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, to continue to intercept wire communications to and from telephone number 301-685-2332 located at Apartment 1304, 8 Charles Plaza, Baltimore, Maryland, in connection with the investigation into possible violations of 21 U.S.C. 174 and 26 U.S.C. 4704(a), 4705(a) and 7237(a) and (b) and a conspiracy to violate those offenses by Nicholas Giordano, a male known as Johnny Poo, Herman Leo Pettiford, Ronald Blackwell, a male known as Brooks, James Albert Williams, Stanley Silverstein, a male known as John, a male known as Roy, Michael Focarile, and others as yet unknown.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that the above-named persons and others as yet unknown have committed and are committing offenses enumerated in Section 2516 of Title 18, United States Code, to wit: violations of 21 U.S.C. 174 and 26 U.S.C. 4704(a), 4705(a), and 7237(a) and (b), and a conspiracy to violate these offenses. I have further determined that there exists probable cause to believe that the above-named persons make use of the described telephone facility in connection with those offenses, that wire communications concerning the offenses will be intercepted,

and that normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, to continue to intercept wire communications from the telephone facility described above for a period of fifteen (15) days.

Sincerely,

Will Wilson

Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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APPLICATION No. 739N

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APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF AN ORDER  
AUTHORIZING THE EXTENSION OF  
WIRE COMMUNICATIONS

AFFIDAVIT

ABRAHAM L. AZZAM, being duly sworn, states:

1. I am a Supervising Agent of the Bureau of Narcotics and Dangerous Drugs (BNDD), United States Department of Justice, and a "law enforcement officer" within the meaning of 18 USC §2510(7). I am charged with supervision of, and am fully familiar with the investigation pending in our Bureau of the narcotic smuggling and trafficking activities of Dominic Nicholas Giordano, aka Nicholas Giordina, aka Nick Jordan, aka Nick, and others.

2. This affidavit is submitted in support of an application for an order authorizing the extension of the interception of wire communications of Dominic Nicholas Giordano and others to and from 8 Charles Plaza, Apt. 1304, Baltimore, Maryland, telephone number (301) 685-2332, subscribed by Dominic Nicholas Giordano (Giordano), within the jurisdiction of the United States District Court for the District of Maryland. The type of communications sought to be intercepted are the details of a system of importation of illegal narcotic drugs into the Baltimore, Maryland area; and the dates, places and identities and roles of the persons involved in committing these offenses, in violation of 21 United States Code §174, 26 United States Code Sections 4705(a); 4704(a) and 7237. The period for which the extension of the interception is fifteen (15) days in view of the complex and continuing nature of the system and the difficulties in identifying its activity or major participants, as demonstrated by the facts set forth in this affidavit below.

3. On October 16, 1970, United States District Judge Edward S. Northrop signed an Order authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs to intercept wire communications from telephone number 685-0211. This telephone was listed to Nicholas Giordano, 8 Charles Plaza, Apt. 1304, Baltimore, Maryland.

4. On October 20, 1970, Giordano changed his telephone number from 685-0211 to telephone number 685-2332.

5. On October 20, 1970, United States District Judge Edward S. Northrop signed an amended Order authorizing interception of communications to and from telephone number (301) 685-2332. The order was also amended to refer to Nicholas Giordina, also known as Nick, as Dominic Nicholas Giordano.

6. I have reviewed the affidavits sworn to by myself and Special Agent Ambrose on October 16, 1970 and filed in Misc. No. 739 (District of Maryland). I reassert the facts, details and conclusions contained in those affidavits.

7. The wire intercept plus a concentrated 24 hour-a-day surveillance on Giordano have provided Special

Agents of the Baltimore Regional Office, Bureau of Narcotics and Dangerous Drugs with the following information:

8. On October 16, 1970, at 6:47 p.m., a source of information, SE-1, called Giordano at telephone number 685-0211 (Call 16-9). SE-1 asked Giordano if he had the "stuff". Giordano stated that he did, but did not want to talk on the phone. Giordano told SE-1 to go to a pay phone and call him back.

9. On October 16, 1970, at 7:05 p.m. (Call 16-12) SE-1 called Giordano and gave him telephone number 752-9329. Giordano stated that he would call him back in five minutes.

10. On October 16, 1970, at 7:10 p.m., Special Agents Stephen H. Greene, Richard L. Jacob, and Michael J. Agnese observed Giordano leave his residence at 8 Charles Plaza via the 7 West Saratoga Street exit, cross the street, and utilize the pay phone there. The phone number of this phone booth is 727-9658. The C and P Telephone Company of Maryland records subpoenaed on 10/19/70 showed that Giordano placed the following calls, between 7 and 8 a.m. on 10/16/70 from phone number 727-9658:

(202) 667-7237      Maybelle Williams  
Apt. 301  
744 Girard St., NW  
Washington, D.C.

(212) 651-2025      Florence Musso  
Apt. 4-G  
108-28 38th Avenue  
Queens, N.Y.

(914) 237-8857      Sam C. Risolo  
Apt. 2F  
248 Hyatt Avenue  
Yonkers, N.Y.

Giordano has placed calls to these numbers before, as is set out in the toll records attached as an Exhibit to the Ambrose Affidavit, dated 10/16/70 (Misc. No. 739).

11. At about 7:45 p.m., Special Agents Greene, Agense and Jacob observed Giordano return to his residence.

12. On October 17, 1970, at 12:55 p.m. (Call 17-17) SE-1 called Giordano and asked if he had the "stuff". Giordano stated that he did and would meet him downstairs in ten minutes.

13. On October 17, 1970, at about 1:30 p.m., Special Agent Glenn C. Brown, working in an undercover capacity, and a source of information, SE-1 purchased 113 grams of Heroin (20% pure—according to an analysis conducted by BNDD Forensic Chemist Allan W. Fein), from Giordano for \$3800 Official Government Funds under the observation of Special Agent Ambrose & Special Agent Stanley M. Grobe. This heroin was not sold to Special Agent Brown in or from the original stamped package as required by 26 USC § 4704(a), and the sale of this heroin to Special Agent Brown was not made pursuant to a written order as required by 26 USC § 4705(a).

14. On October 18, 1970, at 8:33 a.m., (Call 18-10) Giordano received a call from an unknown male who stated that he could not make it today, but could make it the first of the week.

15. On October 18, 1970, at 9:50 a.m., (Call 18-13) an unknown male called Giordano and told him that he would be ready to do business today. Giordano told him he was going out and would not be back until 7:00 or 8:00 p.m. The unknown male asked Giordano if midnight was okay. Giordano said yes, and he would meet him at the "restaurant." Bureau of Narcotics and Dangerous Drugs surveillance has disclosed that the "restaurant" referred to in Giordano's conversations is Bickford's, 105 N. Howard Street, Baltimore, Maryland. In the early morning hours of October 19, 1970, BNDD surveillance disclosed that Giordano met with an individual subsequently identified through Baltimore City Police Department photographs as Ronald E. Blackwell, 1020 Wicklow Road, Baltimore, Maryland. Blackwell was driving a 1970 blue Plymouth, Maryland registration JC-2979. A check by the Department of Motor Vehicles disclosed that reg-



istration No. JC-2979 was issued to National Car Rental. This car was rented from National Car Rental, Friendship Airport by Blackwell (according to National Car Rental records). Blackwell is mentioned in BNDD Case E1-70-0020 as an associate of Herman Lee Pettiford @Skeets, @Skeezie.

16. On October 18, 1970, at 11:40 a.m., (Call 18-15) @Johnny Poo called Giordano and mentioned that "one" is gone and that he was having trouble with the "other." @Johnny Poo stated that he may have to cut it up. Giordano stated he was not worried and will have "5" for "Mike" (identified by BNDD on October 27, 1970 as Michael Focarile @Mickey Ross, New York City).

17. On October 19, 1970, at 1:21 a.m., (Call 19-7) @Johnny Poo called Giordano. Giordano asked @Johnny Poo if someone had sold the "monkey?" @Johnny Poo said that he thought that he had sold it to "Evans." The identity of "Evans" has not been ascertained.

18. At 1:45 a.m., October 19, 1970 Giordano received a call from an unknown male (Call 19-9). Giordano stated "hello?" Caller asked okay (in question form) and Giordano stated okay. End of conversation. BNDD surveillance disclosed that at 2:15 a.m., 10-19-70 Giordano left his residence at 8 Charles Plaza via the 7 West Saratoga Street exit and walked to Park Avenue and Saratoga Street where he entered the 1970 blue Plymouth rented to Blackwell. Giordano and a Negro male then drove back to the apartment complex at 8 Charles Plaza where Giordano exited the vehicle.

19. On October 19, 1970, at 9:09 a.m., (Call 19-24) Giordano called Clementine Ransom and asked her if she wanted to go to Yonkers, New York with him.

20. BNDD surveillance disclosed that at 1:45 p.m., October 19, 1970, a 1969 maroon Lincoln Continental (license #FS-8690), listed to Joe Willie Kennedy, 1210 Henry Court, Baltimore, Maryland, arrived at the Redwood Grill, 319 W. Redwood Street, Baltimore, Maryland, and the driver met Giordano. They were together approximately ten minutes. BNDD agents were unable to

observe what transpired. Kennedy is recorded with the Baltimore City Police Department for narcotics arrests. The driver of the 1970 Lincoln, mentioned above, has been identified as Kennedy through Baltimore City Police Department photographs.

21. On October 21, 1970, at 11:57 p.m. (Call 21-43) @Johnny Poo called Giordano. Giordano stated that he had just returned from Philadelphia. Giordano then said that the next deal with "Mike" would not be till next Monday (10-26-70).

22. BNDD surveillance disclosed that at 12:15 a.m., October 22, 1970, Giordano met with @Johnny Poo at Bickford's (Howard Street). @Poo and Giordano remained together at Bickford's until approximately 1:30 a.m. when Giordano returned to 8 Charles Plaza.

23. On October 22, 1970, at 2:20 a.m., (Call 22-6) an "unknown male" called Giordano and stated that he wanted to deal like last time. The "unknown male" agreed to come by in about an hour. The "unknown male" is identified as Blackwell through subsequent surveillance (See paragraph 24).

24. On October 22, 1970, at 2:53 a.m., (Call 22-7) the "unknown male" in call (22-6) (identified as Blackwell) called Giordano and said that he would be ready in 15 minutes. Giordano replied 20 minutes, I have to get it.

25. At approximately 3:15 a.m. on October 22, 1970, Special Agents John Fencer, Carl Russomanno and Agnese observed a 1970 blue Plymouth, Maryland Registration, JC-2979, registered to National Car Rental, Friendship Airport, and rented by Blackwell, parked in front of 7 West Saratoga Street. The negro male exited the car and entered the lobby of 8 Charles Plaza. The Negro male, later identified as Blackwell, met with Giordano in the lobby for approximately 10 minutes.

26. On October 22, 1970 at 10:47 a.m. (Call 22-14) alias Johnny Poo called Giordano. Alias Johnny Poo told Giordano that there is a "man" "waiting around



the corner" and Giordano stated that he would be there in 10 or 15 minutes. Giordano told alias Johnny Poo to tell the "man" it's "heavy".

27. BNDD surveillance disclosed that from 11:15 a.m. to 11:45 a.m. on 10/22/70 Giordano waited alone on the corner of Redwood and Eutaw Streets, Baltimore and from 11:15 a.m. to 11:45 a.m. on 10/22/70 alias Johnny Poo waited alone on the corner of Howard and Redwood Streets, Baltimore. The two corners referred to above are one block apart.

28. On October 22, 1970 at 12:43 p.m. (Call 22-17) a source of information, SE-1 called Giordano and told Giordano he wanted to talk with him. Giordano told SE-1 to call back about 2:30 p.m. and he will be ready. Giordano said it would take him about ½ hour. On October 22, 1970, at approximately 8:30 p.m. Giordano was observed by Special Agent Stephen Medwid in front of Bickford's Restaurant, 105 N. Howard Street, Baltimore, Maryland. At about 8:45 p.m. Special Agents Greene and Wayne Ambrose, Jr. observed a 1969 red Buick, Maryland registration EH-1631 listed to Eunice Snowden Brooks, 100 9th Street, Laurel, Maryland, driven by alias Brooks, a N/M stop in front of this restaurant. Special Agents Greene and Ambrose then observed Giordano enter this vehicle and remain in it for about five minutes. Giordano then left the vehicle and returned to the restaurant. This 1969 Buick then left the area.

29. On October 22, 1970, at 10:21 p.m. (Call 22-41) SE-1 called Giordano. Giordano told SE-1 to call him back from a pay phone booth.

30. On October 22, 1970, at 10:26 p.m. (Call 22-42) SE-1 called Giordano and gave him the number at a pay phone booth. Special Agents Jacob and Rinehart then observed Giordano exit his residence and walk to the pay phone across the street. Giordano then placed a call to SE-1. Special Agent Brown, who was with SE-1 at the pay phone booth, then talked with Giordano. Giordano told Agent Brown that he (Giordano) would sell ⅛ kilo

heroin for \$3800 and ¼ kilo heroin for \$7000. Giordano also told Agent Brown that he (Giordano) could sell Agent Brown cocaine "which could take a 3½ cut" (which indicates cocaine of exceptional purity). Giordano also told Agent Brown that he (Giordano) did not want to meet Brown but that deals should be through SE-1 since Giordano trusted SE-1.

31. On October 23, 1970, at 10:49 p.m. (Call 23-22) Giordano called Herman Lee Pettiford alias Skeets, alias Skeezie at telephone number 685-8439 (listed to Pettiford at 1432 N. Eden Street, Baltimore, Md.). Giordano told Pettiford he would be available early or late tomorrow. Pettiford asked Giordano about the "other thing". Giordano said that he was not ready yet.

32. On October 23, 1970, at 11:57 p.m. (Call 23-28) Giordano called "Stanley" (later identified as Stanley Silverstein) at the Pimlico Hotel. Silverstein and Giordano agreed to meet at 1:15 a.m. at the "restaurant". (Bickford's). On 10/24/70 at 1:57 a.m., a white male, later identified as Stanley Silverstein (through BNDD surveillance) called Giordano (Call 24-5) and told him that **he wanted the same amount today as yesterday**. Giordano told him that if they wanted to check it they **can check it**. Giordano was then observed by Special Agent Agnese to meet with Silverstein at the corner of Lexington and Liberty Streets, Baltimore, and the meeting took place at approximately 2:10 a.m. Silverstein was identified by BNDD through BCPD photographs.

33. On 10/24/70 at 7:42 a.m. (Call 24-8) an unknown male (later identified through surveillance as Pettiford) called Giordano and Giordano agreed to meet him at the "restaurant" in 20 minutes. Special Agent Ambrose observed Giordano meet with Pettiford at Bickford's Restaurant (Howard Street) at approximately 10:30 a.m. They remained together approximately 10 minutes. Giordano then went to a barber shop (7 W. Howard Street). At 11:15 a.m. Giordano exited the barber shop, crossed the street and entered a 1969 blue Rambler sedan (Md license **HR-6579**, listed to Michael William Krabousanos,

1626 Gail Road, Baltimore, Md.). Giordano and 2 white males were followed in the vehicle to Philadelphia, Pa., when surveillance was lost.

34. On October 27, 1970, at 8:12 a.m. (Call 27-18) alias Johnny Poo called Giordano. Giordano told alias Johnny Poo that he wanted to call "Mike" today.

35. On October 27, 1970 at 12:48 p.m. (Call 27-35) Giordano called telephone number (914) 237-8857 listed to Sam C. Risolo, Apt. 2F, 248 Hyatt Avenue, Yonkers, N.Y. Giordano advised that he would "definitely be up there" and that he would call him back in approximately one hour and ten minutes. Giordano has placed a call to telephone number (914) 237-8857 before from the pay phone across the street from his residence on 10/16/70.

36. Region #4, BNDD surveillance disclosed that at approximately 1:45 p.m. on 10/27/70, Giordano left via bus to Washington, D.C. carrying a black briefcase. Giordano then took a plane to LaGuardia Airport in New York City, NY.

37. At LaGuardia Airport, Region #2, New York City Special Agents, BNDD, observed Giordano meet with an unknown white male who directed Giordano to a parked vehicle outside the terminal. Giordano got into the vehicle and the vehicle drove around the parking lot and returned to the terminal. The vehicle was listed as owned by Florence Musso. A telephone listed to Florence Musso was called by Giordano on October 16, 1970 and that number had been called previously by Giordano on other occasions (See C and P logs, Exhibit, Ambrose affidavit, 10-16-70). Giordano then exited the vehicle with a different briefcase and went inside the terminal under the observation of Region #2 Special Agents. One of the men in the vehicle was identified by Region #2 Special Agents as Michael Focarile @ Mickey Ross.

38. Giordano then flew to Buffalo, New York (Giordano purchased his plane reservation in the name Nick Gino) under the observation of Special Agents Agnese and Russomanno. While in Buffalo, Giordano met with

James Albert Wallace @Buffalo Reds @Cootie Reds, a known narcotics trafficker they exchanged briefcases in a parking lot behind a motel near the airport. James Albert Wallace is listed as a narcotics trafficker and associate of James Thomas Wescott, Baltimore, in BNDD Region 4 file E1-68-0014.

39. Giordano then returned to Baltimore and BNDD surveillance disclosed that Giordano returned to 8 Charles Plaza, Baltimore at approximately 11:45 p.m.

40. BNDD surveillance (Special Agent Stephen Greene) disclosed that at approximately 3:45 a.m., 10-28-70, Giordano took an airport limousine to Friendship Airport. Giordano enplaned from Friendship at 4:15 a.m. (using the name P. Burdi). Giordano arrived at Kennedy Airport, New York, at 5:00 a.m., October 28, 1970. Giordano met a white female and a white male (meeting the description of Focarile). Giordano then went to LaGuardia Airport. Giordano was seen by Agent Greene at LaGuardia. At 7:00 a.m., October 28, 1970, Giordano enplaned for Buffalo, New York, using the name P. Burdi. Giordano arrived in Buffalo, New York at 8:00 a.m. At 8:45 a.m., Giordano left by airport limousine for the Statler Hilton Hotel, Buffalo, New York. Surveillance was lost for approximately 45 minutes in Buffalo, New York. At approximately 11:30 a.m., surveillance was resumed at the Buffalo Airport. Giordano then flew to Toronto, Canada. Royal Canadian Mounted Police assumed surveillance and observed Giordano at a race track in Toronto, Canada. Giordano used the name P. Burdi for entrance to exit from Canada. Surveillance was lost and then resumed by BNDD agents who saw Giordano at Friendship Airport, Baltimore, at approximately 10:50 p.m., October 28, 1970. Throughout October 27 and 28, 1970, Giordano performed counter surveillance techniques.

41. Because of Giordano's activities on October 26 and 28, 1970, he is apparently receiving his narcotics from the Tuminaro organization (BNDD-AM00004) centered in New York. Focarile has been identified by Region #2 Special Agents as a member of the Tuminaro organization.

42. On October 29, 1970, at 6:55 a.m., (Call 29-11) Giordano placed a call to an unknown male (referred to as @Brooks) at telephone #301-776-7894. This number is listed to Miss Janice E. Marshall, Apt. 201, 100 9th Street, Riverview Apartments, Laurel, Maryland. Brooks was not there.

43. On October 29, 1970, at 10:47 a.m., (Call 29-17) Silverstein called Giordano and they agreed to meet at Bickford's Restaurant at 6:30 p.m. Special Agents Ambrose, Agnese, Sabo, Nelson and Russomanno observed Giordano meet with Silverstein at approximately 6:30 p.m. Special Agent Ambrose observed Giordano give Silverstein what appeared to be an envelope. Giordano and Silverstein then made a phone call from a pay phone booth.

44. On October 29, 1970, at 10:52 a.m., (Call 29-19) SE-1 called Giordano. Giordano told SE-1 that he would call him back at the pay phone at about 1/2 hour later. Giordano called SE-1 at a pay phone booth. Special Agent James E. Quander monitored the call. SE-1 told Giordano that he had a customer from Chicago, Illinois, who wanted one to two kilos of heroin. Giordano became suspicious and warned SE-1 to avoid strangers from out of town citing several narcotic traffickers who were caught that way. Giordano stated to SE-1 that his "people" in New York already had men in Chicago and that SE-1's customer should deal with the local traffickers rather than him. Giordano advised SE-1 that if the customer persisted, SE-1 should obtain his name and address and Giordano's "people" in New York would check him out.

45. On October 29, 1970, at 3:45 p.m., (Call 29-26) Giordano called telephone number 685-8439 and asked for Pettiford.

46. On 10/29/70, at 4:53 p.m. (Call 29-33) Giordano called Pettiford at telephone number 685-8439. Giordano agreed to meet Pettiford at Bickford's Restaurant at 6:30 p.m. Giordano told Pettiford "I'll have that thing for

you." At 6:50 p.m. on 10/29/70, Special Agents Agnese, Russomanno, Hogan, Fencer and Sabo observed Giordano meet with Pettiford at Howard and Fayette Streets. Special Agents Agnese, Russomanno and Sabo observed Giordano put his arm around Pettiford and hand him something. Pettiford and Giordano then departed separately.

47. On 10/29/70, at 10:16 p.m. (Call 29-45) alias Brooks from Laurel, Maryland called Giordano and they agreed to meet at Bickford's Restaurant at 11:30 p.m. on 10/29/70. Alias Brooks was identified by voice as the same individual whom Giordano called at (301) 776-7894, listed to Miss Janice C. Marshall, Apt. 201, 109th Street, Laurel, Maryland. On 10/29/70, at 11:06 p.m. alias Brooks called Giordano (Call 29-47) and Nick stated that he would be five minutes late. During the early morning hours of 10/30/70, Special Agents Medwid and Candell observed a 1969 red Buick Maryland registration EH-1631 listed to Eunice Snowden Brooks, 100 9th Street, Laurel, Maryland, park in front of Bickford's Restaurant at 105 N. Howard Street, Baltimore, Maryland. Special Agents Medwid and Candell then observed a Negro male meet with Giordano in the restaurant.

48. On 10/30/70 at 5:57 a.m. (Call 30-5) alias Johnny Poo called Giordano. Giordano said that he was going to New York to see a guy, "get this thing", and come back.

49. On 10/31/70, at 8:19 a.m., (Call 31-5) alias Johnny Poo called Giordano. Alias Johnny Poo said he was going up to New York City either by train or bus so he can give "Mike" some loot. Giordano told Johnny Poo he can reach "Mike" at 651-5096 (202-651-5096 is listed to Ambrose Musso, 108-23 38th Avenue, Queens, New York. See above, par. 10, for Florence Musso address), or 445-9500. Giordano told alias Johnny Poo that he also might be up to New York City. Giordano also said he wants to get a hold of Roy to discuss a deal.

50. On 10/31/70, at 10:18 a.m., (Call 31-12) Giordano called Elaine Floyd (his daughter) at telephone number



355-1500. Elaine Floyd lives at 4112 Audrey Avenue, 1st floor apartment, Baltimore, Maryland. Giordano told Elaine that he had a lot of money for her to hide for him. She said she would hide it in her basement.

51. Region 4, BNDD Surveillance disclosed that at approximately 12:00 p.m., 10-31-70, Giordano took a Trailways Bus to Washington, D.C., arriving at approximately 1:00 p.m., Giordano walked to the Albert Pick Hotel (12th and K Sts.) and went inside and made a phone call. Giordano went out on the street and waited for approximately 15 minutes. James Albert Williams drove up in a 1970 Buick Electra automobile 545263, listed to James Albert Williams, 2240 13th Street, N.W., Washington, D.C. Giordano entered the vehicle, carrying both attache cases (which he brought from Baltimore) and remained there approximately 5 minutes. Giordano exited the vehicle with the attache cases. Giordano then took a cab to National Airport. There Giordano took a shuttle flight to La Guardia, N.Y. Surveillance of Giordano was lost at La Guardia by Region 2, BNDD agents.

52. On November 1, 1970, at 8:18 a.m. (Call 1-2) Pettiford called Giordano. Pettiford told Giordano that he didn't see the guy. Giordano told Pettiford that he doesn't have the "big one". Pettiford told Giordano that he will call back later. Pettiford wants to talk to Giordano and get something.

53. On 11/1/70, at 9:06 a.m. (Call 1-6) Giordano called telephone number 354-0125. Giordano asked for Roy. Roy was not in.

54. On 11/1/70, at 10:41 a.m. (Call 1-16), alias Johnny Poo called Giordano. Alias Johnny Poo told Giordano that he called "Mike" twenty times in New York and did not get him. Giordano said that he did not get in touch with him either. Alias Johnny Poo told Giordano that he talked with a lot of junkies trying to get information. Giordano stated that "Mike" must be out of town. Giordano contacted a lot of smaller people, but Giordano is waiting on a call from "Mike". Giordano has money he owes "Mike".

55. On 11/1/70, at 10:46 a.m. (Call 1-17) Giordano called telephone number 354-0125. Giordano asked for Roy. Roy was not in.

56. On 11/1/70, at 4:33 p.m., (Call 1-56) Giordano called telephone number 354-0125. Giordano spoke with Roy. Giordano told Roy that he got the other "thing" for him. Giordano told Roy that he will see him on Tuesday.

57. On 11/1/70, at 4:39 p.m. (Call 1-57) an unknown male called Giordano and asked him if he got a hold of "Mike". Giordano said that he did not.

58. On November 1, 1970, 4:47 p.m., (Call 1-58) Giordano called telephone number (212) 651-2025 listed to Florence Musso, Apt. 4-G, 108-28 38th Avenue, Queens, New York. Giordano spoke to an unknown male and asked if he could take care of him tonight. The male answered no. Giordano hung up.

59. On November 1, 1970, at 5:48 p.m., (Call 1-66) Pettiford called Giordano and said he can't see the man until 8:00 p.m. Giordano said he would be ready whenever he is. Pettiford said he will call Giordano back when he is ready.

60. On November 1, 1970, at 7:42 p.m., (Call 1-70) Giordano called James Albert Williams at telephone number (202) 667-7237. Williams said he would not be ready until tomorrow at about 5:00 p.m. Giordano said he would not be here tomorrow.

61. On November 1, 1970, 10:47 p.m., (Call 1-88) Pettiford called Giordano and wanted Giordano to meet him at North and Gay Streets. Giordano said he did not want to go up there. Pettiford said he would call back.

62. On November 1, 1970, 11:31 p.m., (Call 1-89) Pettiford called Giordano and told him he would be there in 3 minutes, and that he was in a cab. Giordano told Pettiford to make it ten minutes same place as last time. BNDD surveillance disclosed that about 12:05 a.m., on November 2, 1970, Pettiford met Giordano at the corner of Mulberry and Park Avenue, Baltimore. Special Agent



Rinehart observed Giordano take a small package from his right coat pocket and hand it to Pettiford. Pettiford then handed Giordano some money and Giordano thumb-ed through the money. Giordano and Pettiford separated. Giordano returned to his residence, and Pettiford was fol-lowed by Special Agents Greene, Farley and Jacob to 1713 North Patterson Park Avenue where Pettiford and a Negro female who accompanied him entered that ad-dress. 1713 North Patterson Park Avenue, Baltimore, Maryland, is listed as owned by James F. Santos.

63. On November 2, 1970, at 9:35 a.m., (Call 2-7) Gior-dano called telephone number 354-0125. Giordano asked for Roy and Roy was not in.

64. On November 2, 1970, 10:56 a.m., (Call 2-10) Gior-dano called telephone number 354-0125 and asked for Roy. Roy was not there. Giordano said he will call back later.

65. On November 2, 1970, at 11:07 a.m. (Call 2-12) Giordano called telephone number 539-9463 and spoke with @Johnny Poo. Giordano told @Johnny Poo that he gave the "order" to the man in New York, and he might go see him.

66. On November 2, 1970, at 11:10 p.m., (Call 2-13) Giordano again called telephone number 539-9463. Gior-dano stated to @Johnny Poo that he wanted to talk to @John. @Johnny Poo said that @John was not there. Giordano said that he was looking for either @John or @Roy because he had a customer to buy the "queen" at a good price and the other "thing."

67. Whereabouts of Giordano were unknown from ap-proximately 4:00 p.m., November 2, 1970 to November 4, 1970.

68. After analyzing the intercepted conversations to and from telephone number (301) 685-2332 and the re-sults of BNDD surveillance, I have determined, based upon my experience as a narcotics law enforcement officer (see Azzam affidavit, 10-16-70, Misc. No. 739), that prob-

able cause exists to conclude that the following individuals are associated with Giordano in illegal narcotics trafficking:

- (a) Michael Focarile—New York supplier
- (b) @Johnny Poo—Giordano's lieutenant
- (c) Herman Lee Pettiford—wholesale customer
- (d) Ronald Blackwell—wholesale customer
- (e) James Albert Williams—wholesale customer
- (f) Stanley Silverstein—wholesale customer
- (g) @Brooks (Name unknown)—wholesale customer
- (h) @John (Name unknown)—wholesale customer
- (i) @Roy (Name unknown)—wholesale customer

69. The full scope of the Giordano organization is not known. Probable buyers such as @Brooks, @John and @Roy have not been identified by name, nor have they been photographed. No description exists for @John and @Roy.

70. Joe Willie Kennedy, Clementine Ransom and Lois Holliday and @Tracey appear to be connected in the Giordano organization; however, probable cause to so link those individuals has not as yet, been developed.

71. Giordano has referred to his "people" in New York; however only one probable supplier has been identified (Michael Focarile). On October 28, 1970, Giordano met with a man and a woman at LaGuardia Airport.

72. Giordano's connection by Buffalo, New York and Toronto, Ontario have not been fully developed.

73. Giordano has referred to numerous individuals (not by name)—as appears from intercepted conversations—who are his customers. These individuals have not been identified in any particular or certain manner.

### UNAVAILABILITY OF OTHER METHODS OF INVESTIGATION

74. Reference is made to Part IV, Ambrose Affidavit, 10/16/70, Misc. No. 739.

75. Giordano told Special Agent Brown that he (Giordano) did not wish to meet Brown. Giordano indicated that he *would deal only* with people whom he trusted. Infiltration of the Giordano organization remains impossible.

76. See Paragraph 44 above where Giordano indicated that he would be wary of strangers and that "his people" in New York could "check out" potential customers.

77. Giordano exhibits the characteristics of a high-level narcotics trafficker—extreme caution. When travelling, he continually uses various counter-surveillance techniques. In his transactions, he limits his contacts to a small number of trusted individuals. In his telephone conversations, he is extremely guarded in what he says and any specific narcotics conversations he makes are from pay phones. Conventional surveillance would be completely ineffective except as an adjunct to electronic interception.

WHEREFORE, your affiant believes that probable cause exists to believe that Nicholas Giordano and other persons referred to in this Affidavit and others as yet unknown are engaged in the commission of offenses involving the importation, receipt, concealment, sale and distribution of narcotics, and conspiracy to do so; that Nicholas Giordano uses the premises Apt. 1304, 8 Charles Plaza, Baltimore, Maryland in this District and within the jurisdiction of this Court to conduct this activity; that he has used and will continue to use the telephone numbered 301/685-2332 at this premises to conduct this activity; that further communications concerning these offenses will take place over this telephone and will be obtained through the interception of these wire communications; and that no other investigative procedures appears likely to succeed.

/s/ Abraham L. Azzam

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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MISCELLANEOUS DOCKET No. 739N

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APPLICATION OF THE UNITED STATES OF  
AMERICA IN THE MATTER OF EXTENSION  
OF AN ORDER AUTHORIZING THE  
INTERCEPTION OF WIRE COM-  
MUNICATIONS

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ORDER

To: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

Application under oath having been made before me by the United States through its Attorney, Francis S. Brocato, Assistant U. S. Attorney for the District of Maryland, and on "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, and full consideration having been given to the matters set forth therein, the court finds:

(a) there is probable cause to believe that Nicholas Giordano and a male @Johnny Pool, Herman Lee Pettiford, Ronald Blackwell, a male @Brooks, James Albert Williams, Stanley, Silverstein, a male @John, a male @Roy, Michael Focarile, and others as yet unknown, have committed, and are committing, offenses involving the receiving, concealing, buying, and selling of illegal narcotic drugs, and the purchase, sale or dispensing of narcotic drugs which are not in or from the original stamped package, and the sale or exchange of narcotic drugs without written order forms in violation, respectively, of 21 USC § 174 and 26 USC

§§ 4704(a), 4705(a), and 7237(a) and (b), and a conspiracy to violate the aforesaid offenses.

(b) there is probable cause to believe that wire communications concerning these offenses will be obtained through the interception, authorization for which is herein applied for. In particular, these wire communications will be between Nicholas Giordano and his suppliers (Michael Focarile and others yet unknown) concerning: the date, time and place, illegal narcotic drugs will be delivered to Nicholas Giordano. Also, these wire communications will be between Nicholas Giordano and his buyers (a male @Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male @Brooks, James Albert Williams, Stanley Silverstein, a male @John, a male @Roy and others yet unknown) concerning: the date, time and place Nicholas Giordano will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the telephone listed in the name of Nicholas Giordano, and located at Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, and carrying the telephone number (301) 685-2332, has been used, is being used, and will be used, in connection with the commission of the offenses described above and is commonly used by Nicholas Giordano, a male @Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male @Brooks, James Albert Williams, Stanley Silverstein, a male @John, @Roy, Michael Focarile, and others as yet unknown.

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who

has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to:

(1) intercept wire communication of Nicholas Giordano, a male @Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male @Brooks, James Albert Williams, Stanley Silverstein, a male @John, a male @Roy, Michael Focarile, and others as yet unknown concerning the above-described offenses to and from the telephone listed in the name of Nicholas Giordano and located at Apt. 1304, 8 Charles Plaza, Baltimore, Maryland, and bearing the telephone number (301) 685-2332.

(2) such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the details of the scheme which has been used by Nicholas Giordano and a male @Johnny Poo, Herman Lee Pettiford, Ronald Blackwell, a male @Brooks, James Albert Williams, Stanley Silverstein, a male @John, a male @Roy, Michael Focarile and others as yet unknown to receive, conceal, buy, and sell illegal narcotic drugs, and the identity of his confederates, their places involved therein, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of fifteen (15) days from the date of this order.

PROVIDING ALSO, that Francis S. Brocato, Assistant U. S. Attorney for the District of Maryland, shall provide the court with a report on the 2nd, 4th, 8th, 10th, 12th,

14th, and 15th day following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/ Edward S. Northrop  
Chief Judge, U.S. District Court

Date: 6th November, 1970

True copy

Test:

Paul R. Schlitz  
Clerk

/s/ M. A. Heinzerling  
Deputy Clerk



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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Misc. No. 737

APPLICATION OF THE UNITED STATES OF AMERICA IN THE  
MATTER OF AN ORDER AUTHORIZING THE INSTALLATION  
OF A DEVICE TO REGISTER TELEPHONE NUMBERS CALLED  
FROM THE TELEPHONE NUMBERED 301/685-2332

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ORDER

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon application of the United States, through its attorneys, George Beall, United States Attorney for the District of Maryland and Francis S. Brocato, Assistant United States Attorney for said District, and one Abraham L. Azzam, a Group Supervisor of the Bureau of Narcotics and Dangerous Drugs (BNDD), for an Order authorizing the continuation of a device to register telephone numbers called from the telephone subscribed by Dominic Nicholas Giordano (Giordano) and full consideration having been given to the matters set forth, the affidavit of Abraham L. Azzam being attached, the Court finds:

A. There is probable cause to believe that Giordano of Baltimore, Maryland, within this District, is committing, and is about to commit, and is conspiring with other persons to commit, offenses involving the sale of narcotic drugs in violation of 21 USC § 174, 26 USC §§ 4704(a) and 4705(a).

B. There is probable cause to believe that the telephone located at Apartment 1304, 8 Charles Plaza, Baltimore, Maryland, subscribed by Nicholas Giordina (Dominic Nicholas Giordano) and carrying telephone number



301/685-2332 is being used and is about to be used by Giordano in connection with the commission of the above-mentioned offenses involving the use of communication facilities in committing, attempting to commit, or conspiring to commit narcotic offenses in violation of 18 USC § 1403.

C. There is probable cause to believe that telephone numbers presently being called from the telephone subscribed to by Giordano and carrying telephone number 301/685-2332 are being called by Giordano and that these calls relate to narcotics transactions.

WHEREFORE, it is hereby ORDERED that:

Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized to:

Continue in use a device which will register the telephone numbers called from the telephone subscribed to by Giordano and carrying number 301/685-2332.

PROVIDING THAT, this authorization to register telephone numbers called shall be executed as soon as practicable after signing this Order and must terminate in fifteen (15) days from the date of this Order.

IT IS FURTHER ORDERED that this Order be sealed and that two (2) certified copies thereof be issued to Special Agent Wayne A. Ambrose, Jr. of BNDD.

/s/ Edward S. Northrop  
EDWARD S. NORTHROP  
Chief Judge  
U. S. District Court  
for the District of Maryland

Date: 11-6-70

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CR. No. 70-0483

UNITED STATES OF AMERICA

v.

MICHAEL FOCARILE, et al.

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CR. No. 70-0486

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO

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CR. No. 70-0487

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO and  
MICHAEL FOCARILE

## ORDER

Upon the Court's Motion, it is this 24th day of January, 1972,

ORDERED that by the close of business on January 27, 1972, Francis S. Brocato, Assistant U.S. Attorney for the District of Maryland, submit to this Court an Affidavit or Affidavits, if necessary, setting forth the facts relating to the authorization and approval of the initial Wire Tap Order and Extension thereof involved in these cases; and

IT IS FURTHER ORDERED that Francis S. Brocato, Assistant U.S. Attorney, furnish a copy of said Affidavit or Affidavits to counsel of record by January 28, 1972; and

IT IS FURTHER ORDERED that counsel of record may file motions, if they so choose, based upon the Affidavit or Affidavits submitted to them; in any event, such motions must be filed with this Court no later than January 31, 1972; and

IT IS FURTHER ORDERED that should such motions be filed, argument will be held before this Court at 10:00 a.m., February 1, 1972, and

IT IS FURTHER ORDERED that Francis S. Brocato, Assistant U.S. Attorney, serve a copy of this Order on all counsel of record in the above-captioned cases.

/s/ James R. Miller, Jr.  
Judge

True copy  
Test:

Paul R. Schlitz  
Clerk

/s/ George W. Howard  
Deputy Clerk

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Cr. No. 70-0483

UNITED STATES OF AMERICA

v.

MICHAEL FOCARILE, et al.

---

Cr. No. 70-0486

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO

---

Cr. No. 70-0487

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO and  
MICHAEL FOCARILE

## ORDER

Upon the Court's Motion, it is this 24th day of January, 1972,

ORDERED that by the close of business on January 27, 1972, Francis S. Brocato, Assistant U.S. Attorney for the District of Maryland, submit to this Court an Affidavit or Affidavits, if necessary, setting forth the facts relating to the authorization and approval of the initial Wire Tap Order and Extension thereof involved in these cases; and

IT IS FURTHER ORDERED that Francis S. Brocato, Assistant U.S. Attorney, furnish a copy of said Affidavit or Affidavits to counsel of record by January 28, 1972; and

IT IS FURTHER ORDERED that counsel of record may file motions, if they so choose, based upon the Affidavit or Affidavits submitted to them; in any event, such motions must be filed with this Court no later than January 31, 1972; and

IT IS FURTHER ORDERED that should such motions be filed, argument will be held before this Court at 10:00 a.m., February 1, 1972, and

IT IS FURTHER ORDERED that Francis S. Brocato, Assistant U.S. Attorney, serve a copy of this Order on all counsel of record in the above-captioned cases.

/s/ James R. Miller, Jr.  
Judge

True copy

Test:

Paul R. Schlitz  
Clerk

/s/ George W. Howard  
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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CRIMINAL No. 70-0483-M  
UNITED STATES OF AMERICA

vs.

MICHAEL FOCARILE, et al.

---

CRIMINAL No. 70-0486-M  
UNITED STATES OF AMERICA

vs.

DOMINIC NICHOLAS GIORDANO, et al.

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CRIMINAL No. 70-0487-M  
UNITED STATES OF AMERICA

vs.

DOMINIC NICHOLAS GIORDANO, et al.

---

ORDER

It having been represented to this court by Francis S. Brocato, Assistant United States Attorney for the District of Maryland, that the United States Government is unable to comply with the order of January 24, 1972 to submit affidavits to this court by January 27, 1972, it is this 27th day of January, 1972, by the United States District Court for the District of Maryland,

ORDERED that Francis S. Brocato, Assistant United States Attorney, shall be granted an extension of time to produce said affidavit or affidavits until 5 p.m., on February 1, 1972; and it is further

ORDERED that Francis S. Brocato, Assistant United States Attorney, furnish a copy of said affidavit or affidavits to counsel of record by February 2, 1972; and it is further

ORDERED that the counsel of record may file motions, if they choose, based upon the affidavit or affidavits submitted to them; in any event, such motions must be filed with this court no later than 12 Noon, on February 7, 1972; and it is further

ORDERED that should such motions be filed, argument will be held thereon before this court at 9 a.m., February 8, 1972; and it is further

ORDERED that Francis S. Brocato, Assistant United States Attorney, send a copy of this order to all counsel of record.

/s/ James R. Miller, Jr.  
United States District Judge

I hereby attest and certify on January 27, 1972 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

/s/ Paul R. Schlitz  
Clerk, U.S. District Court  
District of Maryland

/s/ By George W. Howard, III  
Deputy

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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Criminal No. 70-0483

UNITED STATES OF AMERICA

v.

MICHAEL FOCARILE, ET AL.

---

Criminal No. 70-0486

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO

---

Criminal No. 70-0487

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO

---

SUPPLEMENTAL MOTION TO SUPPRESS

Now comes the Defendant, Dominic Nicholas Giordano, by his attorney, H. Russell Smouse, and by way of supplement to the Motion to Suppress heretofore filed, sets forth the following point to be considered by this Honorable Court in addition to those points which have already been raised, argued and briefed in support of said motion.

1. That the United States Department of Justice acted improperly in the manner in which it obtained authorization and approval of the application for the (Title III



Wiretap) Order of October 16, 1970. That the facts setting forth the handling of said authorization and approval of application for a wiretap order are set forth in the affidavits of Sol Lindenbaum, Executive Assistant to the Attorney General of the United States and Harold P. Shapiro, Deputy Assistant Attorney General, Criminal Division, Department of Justice, both dated January 28, 1972, which said affidavits have been filed by the Government as part of the record in this case. That the affidavits aforesaid, and the relevant facts underlying application for the October 16 (Wiretap) Order, demonstrate a clear violation of 18 U.S.C., § 2516(1).

2. That this Defendant reiterates his reliance on the grounds originally cited to the Court in support of the original Motion to Suppress and the points and authorities submitted in support thereof. That this additional ground is being raised due to the handling of the wiretap applications in the instant case by the United States Department of Justice as first revealed subsequent to *U.S. v. Robinson* (5th Cir., January 12, 1972) 40 Law Week 2454. That following the revelations of Robinson (more familiarly known as the Escandar case), counsel for this defendant called Francis S. Brocato, Assistant United States Attorney for the District of Maryland, on January 18, 1972, and made inquiry as to whether the facts with regard to the application here made by the Government to Chief Judge Edward S. Northrop for the Order of October 16, 1970 and the Extension Order of November 6, 1970 were, in fact, as had been represented to the Court. Mr. Brocato indicated that Will Wilson, Assistant Attorney General in charge of the Criminal Division of the Department of Justice had the requisite authority to authorize application for the Title III Order and that, in any event, the Attorney General of the United States had undoubtedly reviewed the moving papers. Subsequent to this, Mr. Brocato, on learning the true facts, very commendably called counsel for this Defendant on Monday, January 24, 1972, and advised that the underlying facts with regard to authorization, approval and handling of the application by the Department of Justice and the authorization for submission to the Court

of application for the Title III wiretap orders were perhaps not as originally represented.

That counsel for this Defendant thereupon sought a meeting with Honorable James R. Miller, Jr. on January 24, 1972, which said meeting gave rise to the Order of that date directing the Government to file affidavits herein setting forth the relevant facts. That the affidavits now submitted by the Government clearly indicate that the facts herein are in line with the factual situation which obtained in Escandar and that the Government, accordingly, acted in contravention of the statutory mandate of 18 U.S.C., § 2516(1).

---

H. RUSSELL SMOUSE  
1700 First National Bank Building  
Baltimore, Maryland 21202  
Counsel for Defendant,  
Dominic Nicholas Giordano

*Points and Authorities*

- 18 U.S.C.S., § 2516 (1)  
*U.S. v. Robinson* (5th Cir., January 12, 1972) 40  
 Law Week 2454  
*U.S. v. Aquino, et al.* (E.D. Mich., January 17,  
 1972), unreported, opinion by Judge Cornelia G.  
 Kennedy  
*U.S. v. Ciral* (W.D. Pa., January 13, 1972), unre-  
 ported, opinion by Judge Gerald J. Weber

Respectfully submitted,

---

H. RUSSELL SMOUSE  
Counsel for Defendant,  
Dominic Nicholas Giordano

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

---

Criminal No. 70-0483

UNITED STATES OF AMERICA

*vs.*

MICHAEL FOCARILE, ET AL.

---

Criminal No. 70-0486

UNITED STATES OF AMERICA

*vs.*

DOMINIC NICHOLAS GIORDANO

CRIMINAL No. 70-0487

UNITED STATES OF AMERICA

vs.

DOMINIC NICHOLAS GIORDANO

and

MICHAEL FOCARILE

---

AFFIDAVIT

District of Columbia:

Sol Lindenbaum being duly sworn deposes and says:

At the times of the acts related in this affidavit I was and I am now the Executive Assistant to the Attorney General of the United States. I assist the Attorney General in the review of various matters which require his personal attention such as opinions, interpretations, decisions of the Board of Immigration Appeals, applications for pardon and other forms of Executive clemency, anti-trust complaints, contracts, agreements, and proposed offers in compromise. See Title 28, Code of Federal Regulations, Section 0.6.

The Attorney General has refrained from designating any Assistant Attorney General to authorize, without his approval, the making of an application for an order permitting the interception of wire or oral communications under Title 18, United States Code, Section 2516(1). Rather, the Attorney General has required that all requests for such authorization be referred to him for consideration. In the normal course of my duties, I review such requests and make recommendations to the Attorney General thereon. I have routinely reviewed such requests since February 1969 and, accordingly, have become famil-

iar with the applicable statutory requirements and the actions taken by the Attorney General on such requests.

On October 16, 1970, the Criminal Division of the Department of Justice addressed to the Attorney General a request for approval of an authorization to apply for an interception order initiated by the Director of the Bureau of Narcotics and Dangerous Drugs and related to a certain telephone in Baltimore, Maryland, allegedly used by Nicholas Giordina and others. The request was accompanied by copies of the proposed affidavit, application, and order, as well as a recommendation for approval from the Criminal Division. I reviewed the submitted material and concluded that the request in this case satisfied the requirements of the statute. I also concluded, from my knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him. Because the Attorney General was on a trip away from Washington, D.C. I approved the request pursuant to the authorization which he had given to me to act in the circumstances and caused his initials to be placed on a memorandum to Will Wilson. The memorandum, a copy of which is attached, approved a request that authorization be given to Francis S. Brocato to make application for an interception order.

On November 6, 1970 the Attorney General approved a request that authorization be given to Francis S. Brocato to make application for an order continuing the interception on the telephone in Baltimore, Maryland, allegedly used by Nicholas Giordano and others. Attached is a copy of the Attorney General's personally initialed memorandum of that date to Will Wilson reflecting his favorable action on the request.

/s/ Sol Lindenbaum  
Executive Assistant of the Attorney  
General of the United States

Subscribed and sworn to before me this 28th day of January, 1972.

Audrey Anne Crump

UNITED STATES GOVERNMENT  
DEPARTMENT OF JUSTICE  
MEMORANDUM

October 16, 1970.  
(JNM:PTW:skh)

## TO:

Will Wilson  
Assistant Attorney General  
Criminal Division

## FROM:

John N. Mitchell  
Attorney General

Subject: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Assistant United States Attorney Francis S. Brocato, District of Maryland, to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty-one (21) day period to and from telephone number 301-685-0211, located at 8 Charles Plaza, Apartment 1304, Baltimore, Maryland, in connection with the investigation into possible violations of Title 21, United States Code, Section 174 and 26 United States Code, Sections 4704(a), 4705(a) and 7237(a) and (b) by Nicholas Giordina and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Francis S. Brocato to make the above-described application.

---

UNITED STATES GOVERNMENT  
DEPARTMENT OF JUSTICE  
MEMORANDUM

November 6, 1970.  
(JNM:PTW:lrt)

## TO:

Will Wilson  
Assistant Attorney General

## FROM:

John M. Mitchell  
Attorney General

Subject: *Interception Order Authorization Extension*

This is with regard to your recommendation that authorization be given to Assistant United States Attorney Francis S. Brocato, District of Maryland, to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the continued interception of wire communications for a fifteen (15) day period to and from telephone number 301-685-2332 in connection with the investigation into possible violations of 21 U.S.C. 174 and 26 U.S.C. 4704(a), 4705(a), and 7237(a) and (b) and a conspiracy to violate these offenses by Nicholas Giordano and others.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially delegated to exercise that power for the purpose of authorizing Francis S. Brocato to make the above-described application.

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

---

CRIMINAL No. 70-0483

UNITED STATES OF AMERICA

vs.

MICHAEL FOCARILE, *et al.*

---

CRIMINAL No. 70-0486

UNITED STATES OF AMERICA

vs.

DOMINIC NICHOLAS GIORDANO

CRIMINAL No. 70-0487

UNITED STATES OF AMERICA  
vs.  
DOMINIC NICHOLAS GIORDANO  
and  
MICHAEL FOCARILE

---

AFFIDAVIT

District of Columbia :

Harold P. Shapiro, being duly sworn, deposes and says:

At the times of the events related in this affidavit, I was a Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice.

This affidavit describes the processing within the Criminal Division of the Department of Justice of two requests for authorization to make application to a Federal Court for wire interception orders. Both requests related to a certain telephone in Baltimore, Maryland, allegedly used by Nicholas Giordina or Nicholas Giordano and others.

The formal requests for authorization to apply for wire interception orders were made by the Director of the Bureau of Narcotics and Dangerous Drugs on October 15 and November 5, 1970, respectively. Prior to action on each request, the respective Departmental working file, which included copies of the proposed affidavit, application, and order, was reviewed in a special unit of the Organized Crime and Racketeering Section of the Criminal Division by an attorney whose primary function was to review the entire matter for form and substance with particular emphasis on assuring strict adherence to the required statutory, judicial and Constitutional standards. The attorney of that unit handling the requests, Philip T. White, reviewed the files and recommended favorable action on the requests. The files were then submitted for review to Kurt W. Muellenberg, Deputy Chief, and to William S. Lynch, Chief, Organized Crime and Racketeering Section, respectively, who recommended approval and sent them to me. I examined the files and forwarded them



to the Office of the Attorney General with detailed recommendations that the authorizations be granted. As part of my examination of the files, I reviewed the letters of October 16 and November 6, 1970, to Francis S. Brocato advising him that he was authorized to present the applications to the court, initialed the file copies, and authorized their dispatch upon approval of the request for application in the Office of the Attorney General.

/s/ Harold P. Shapiro  
Deputy Assistant Attorney General  
Criminal Division

Subscribed and sworn to before me this 28th day of January, 1972.

Audrey Anne Crump  
My Commission expires August 31, 1976.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

Number 70-0483 M Criminal

THE UNITED STATES

*vs.*

DOMINIC NICHOLAS GIORDANO, ET AL.

Baltimore, Maryland

February 8, 1972

The above-entitled case came on for hearing of motion before His Honor, James R. Miller, at 9:00 o'clock a.m.

APPEARANCES

*For the Government:*

FRANK S. BROCATO, ESQUIRE

*For the Defendants:*

H. RUSSELL SMOUSE, ESQUIRE

HOWARD L. CARDIN, ESQUIRE

PHILLIP M. SUTLEY, ESQUIRE

\* \* \*

[32] drafted. I believe, if anything, the legislative history is clear upon the fact that they were interested in an idea, and they were interested in the fact that there has to be close supervision at the highest levels of Government. But if you're going to ask them the specific issues involved where you have specific things happening, you'll find that it wasn't considered. And I believe that if it had been considered by them, it wouldn't bother them at all because the process went through—The fact of the matter is that there was a review process, a very

careful review process, involved in these cases, as there is in all Title 3 cases, which very, very, very carefully circumscribe the exercise of the power.

THE COURT: Well, if I understand your position, or the Government's position, Mr. Brocato, it is that the Attorney General has never delegated his authority in this regard—

MR. BROCATO: He has not.

THE COURT: —and specifically in this case, he did not.

MR. BROCATO: That's correct.

THE COURT: So, then, you will stand or fall, forgetting for the moment your argument about harmless error and that part of it, you stand [33] or fall on the argument that the Attorney General has himself exercised his responsibilities in this case?

MR. BROCATO: Yes, sir.

THE COURT: Now, how do you square that with every document in this case—That is, the letter signed by Will Wilson, which says: I have reviewed your request and the facts and circumstances and I have done this, I have determined that there exists probable cause and so on—The authorization doesn't say anything about the Attorney General having done that, or the Attorney General having made me just a communicator of the fact that he has reviewed it and he has done so and so?

MR. BROCATO: Your Honor, it was public knowledge that the Attorney General had not given a specific delegation in this regard to the Assistant Attorney General, but that the delegation, if you want to call it a delegation, became nothing but a ministerial act; it became an ad hoc delegation. The letter, I believe, if read, indicates that he was specially designated in the premises; that is, that the Attorney General had told him that he could or should, in this particular case, authorize, in this particular case, myself; that is, the letter, if carefully read, indicates that the Attorney General had told Will Wilson [34] to authorize me, and if you look at the report on applications for orders authorizing or approving the interception of wire or oral communications,

which is a public document, which is required by the Congress to be presented to the Court—

THE COURT: Well, I'm reading the letter, and I think somewhat carefully, it says, in the second paragraph: I have reviewed your request and the facts and circumstances and have determined—Now, that would mean I have determined—that probable cause exists to believe, and so on. And it says: I have further determined that there exists probable cause to believe, and so on.

MR. BROCATO: Yes.

THE COURT: It doesn't say somebody else has determined, and I have been delegated to advise you of the facts.

MR. BROCATO: Sir—

THE COURT: And then it goes on to say: Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General, the Honorable John N. Mitchell.

MR. BROCATO: That is the moving language.

THE COURT: All right. But why, \* \* \*

\* \* \*

[36] case it was Harold Shapiro who reviewed it.

THE COURT: Well—All right.

MR. BROCATO: In fact, as I have indicated to the Court, you will find that almost—There are no letters which were actually signed by Will Wilson in any Title 3.

THE COURT: But what you are now saying, as I get it, Mr. Brocato, then, is that—Well, are you saying that the letter of October the 16th correctly reflects what happened or not?

MR. BROCATO: The letter of October 16th is absolutely truthful in that it correctly reflects what happened at his level; that is, the level of the Assistant Attorney General. Because when you view—First of all, I'll go through this serially, if I may. There had always been, as a matter of public document, the report of the Administrative Office of the Courts. If you will look at the reports of the Administrative Office of the Courts, you will see that the—They show an Assistant Attorney

General designating, but there is a footnote, and you will find that the reports for '69—There were no taps in '68, the reports for '69, the reports for '70 indicate that the Attorney General personally approved each of the reported applications, and, as authorized by the provisions

\* \* \* \*

[43] process.

THE COURT: I think he could—

MR. BROCATO: With recommendations—

THE COURT: —have done that without delegating anybody.

MR. BROCATO: With recommendations—Your Honor, the determination of what they did here is—becomes almost boiler plate. They plug in statutes, they say that the letter comes from Will Wilson, which indeed it comes from his office. But the fact of the matter is that everybody knows now, and everybody knew then, that the final decision was made by the Attorney General, that the Attorney General had never made any general designation in these cases, that the Attorney General wanted to review all of these and keep the power to himself, and that the Attorney General would not allow Will Wilson to make the determination himself, or in his office to make the determination, and that Will Wilson did not have the authority at his level to one, make a determination generally; or two, even to review generally the Giordano tap or indicate names. When I'm talking about names, it isn't the names which are important, it's the policy. It's the type of tap involved. These are facts.

I believe that all that can be said [44] about the letter is that it is, perhaps, ambiguous. I think, however, that the ad hoc basis and the special designation is clear enough. Also, when you view the fact that it had been public knowledge that the Attorney General reviews them himself.

THE COURT: Well, you say it's public knowledge, but there was a lot of public that didn't have any idea of it apparently, including the Court of the Fifth Circuit in—

MR. BROCATO: Sir—

THE COURT: In Florida, isn't it?

MR. BROCATO: Yes, sir. Your Honor, I didn't have any specific knowledge of it myself—

THE COURT: Pennsylvania.

MR. BROCATO: —also, as to how it was exercised specifically. And in order—With all candor. And in order to find out how the power was exercised specifically, I'm afraid that I had to go to Washington and speak with Sol Lindenbaum personally. But, I know now how it was exercised. I realize that the Court's point is that—

THE COURT: It would appear that Will Wilson wasn't too clear about it either, at least according to his letter.

MR. BROCATO: Your Honor, speaking with \* \* \*

\* \* \* \* \*

[56] you know, specific action as to indicating what was told to the Court, the letter, I believe, indicates what was told to the Court. He did act, he did make those findings.

THE COURT: Who did act?

MR. BROCATO: Well, the office of the—The problem here, Judge, is that I can't tell you who signed it. I know that Will Wilson personally made none of those determinations, but indeed with regard to the Court's reasoning in this case, that would apply to every Title 3 throughout the United States, because Will Wilson made no determinations at any point, and it's very surprising if you find a letter which was signed by Will Wilson. In fact, we were trying to find out—I recall personally when we were trying to find out who signed the Will Wilson letter, and they indicated maybe Will Wilson signed it, and everyone laughed. And they had to find an actual piece of paper which was signed by Will Wilson, which was awfully difficult to find, but finally they did, but it wasn't Will Wilson who had signed that letter.

But, in any event, the issue which you have raised with regard to the letter itself and pointing out where the—and pointing out to the Court where the power lay, that that issue is [57] involved in practically—in every Title 3, as I'm sure the Court's aware, because of the vast number of cases which respond now in almost every

Title 3 where the issue of the Will Wilson letter comes to the fore. And I realize the Court's not concerned with who signed Will Wilson's name, but every time the Court in any case is presented with a so-called document of authorization, which is the Will Wilson letter which are presented in these cases, they became boiler plate out of the organized crime division of the Department of Justice. So that every letter that you're dealing with, whether in this case or any other case, is the same, insofar as the style is concerned. It became a piece of boiler plate where they plugged in the factual situation.

THE COURT: Well, the other cases were not argued, apparently, on the theory that the Attorney General himself authorized it. They were argued on both theories; that is, that the Attorney General delegated, through somebody else, to Will Wilson and Will Wilson delegated to somebody else his exercise of his authority. But you're short-circuiting, or eliminating, the second part of it to stay with the Attorney General exercising the sole responsibility; therefore, the cases, I think, are not [58] the same.

MR. BROCATO: Well, sir, I believe that even Judge Kennedy's case in—or Judge Kennedy's decision in Aquino is on point because of the determination which she made with regard to the initial authorization. There she held that the Attorney General himself personally made the application, or authorized the making of the application.

THE COURT: She did that because his initials appeared to be on it. I wonder. His initials appear to be on the ones in this case, too.

MR. BROCATO: Well, sir, there's a method of finding out, also. If you will look at them, you'll see that his initials are on all authorizations. However, the initials of November 6th, 1970, are his initials, and the initials of October 16th, 1970, are Sol Lindenbaum's initials, and that's how they tell.

THE COURT: Sol Lindenbaum's initials?

MR. BROCATO: Yes, sir. They are the initials of the Attorney General, as written by Sol Lindenbaum.

THE COURT: All right.

MR. BROCATO: And they can tell that by \* \* \*

\* \* \*

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 72-1407

[Filed Oct. 31, 1972, William K. Slate, II, Clerk]

UNITED STATES OF AMERICA, APPELLANT

vs.

DOMINIC NICHOLAS GIORDANO, a/k/a NICK GINO, a/k/a  
P. BURDI, a/k/a NICK GIORDINA; JAMES ALBERT WAL-  
LACE, a/k/a BUFFALO REDS, a/k/a REDS; HERMAN LEE  
PETTIFORD, a/k/a SKEETS, a/k/a SKEEZIE; RONALD E.  
BLACKWELL; MARGARET HARRIS, a/k/a PAT; STANLEY  
SILVERSTEIN; SAMPSON WILLIAMS; ROY LEE DAVIS,  
a/k/a MR. FAIRFIELD, a/k/a FAIRFIELD; JACK BALD-  
WIN, APPELLEES

*Appeal from the United States District Court  
for the District of Maryland*

JUDGMENT

This cause came on to be heard on the record from the United States District court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II  
Clerk



SUPREME COURT OF THE UNITED STATES

No. 72-1057

UNITED STATES, PETITIONER

*v.*

DOMINIC NICHOLAS GIORDANO, ET AL.

ON CONSIDERATION of the motion of respondent Giordano for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 26, 1973

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SUPREME COURT OF THE UNITED STATES

No. 72-1057

UNITED STATES, PETITIONER

*v.*

DOMINIC NICHOLAS GIORDANO, ET AL.

ORDER ALLOWING CERTIORARI—Filed March 26, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

**LIBRARY**  
**SUPREME COURT, U. S.**

No. **52 - 1057**

**FILED**  
**JAN 31 1973**

**MICHAEL WOOD, JR., CL.**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**DOMINIC NICHOLAS GIORDANO**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**DOMINIC NICHOLAS GIORDANO, ET AL.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**ERWIN N. GRISWOLD,**  
*Solicitor General,*

**HENRY E. PETERSEN,**  
*Assistant Attorney General,*

**JEROME M. FEIT,**

**JOHN J. ROBINSON,**

*Attorneys,  
Department of Justice,  
Washington, D.C. 20530.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

DOMINIC NICHOLAS GIORDANO

---

UNITED STATES OF AMERICA, PETITIONER

*v.*

DOMINIC NICHOLAS GIORDANO, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these two cases.<sup>1</sup>

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. D, *infra*) is reported at 340 F. Supp. 1033.

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<sup>1</sup> This petition concerns two related cases which were treated together by the district court and the court of appeals for purposes of disposition, under Fourth Circuit docket numbers 72-1399 and 72-1407. See Rule 23(5) of this Court's rules.

**JURISDICTION**

The judgments of the court of appeals were entered on October 31, 1972. A petition for rehearing was denied on December 27, 1972 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the procedures followed within the Department of Justice in authorizing applications for wiretap orders were sufficient to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

2. Whether, if the authorization to apply for a wiretap order was not sufficient, suppression of the wiretap evidence is required in this case.

**STATUTES INVOLVED**

18 U.S.C. 2516 provides, in pertinent part:

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communication \* \* \*.

The remaining relevant statutory provisions are set forth in Appendix F, *infra*.

**STATEMENT**

The defendants in these cases were charged with narcotics offenses in violation of 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 4701 *et seq.* Prior to

trial, the government notified the defendants that it intended to use at trial evidence obtained from court-authorized wire interceptions conducted under court orders of October 16, 1970, and November 6, 1970, issued pursuant to the provisions of 18 U.S.C. 2510-2520 (Title III, Omnibus Crime Control and Safe Streets Act of 1968). The defendants filed various motions to suppress, including supplementary motions challenging the procedure under which the applications for the wire interception orders were authorized within the Department of Justice. The government opposed these motions and filed affidavits of Sol Lindenbaum, Executive Assistant to the Attorney General (A. 128),<sup>2</sup> and Harold P. Shapiro, Deputy Assistant Attorney General, Criminal Division (A. 132).

The procedure followed by the Department of Justice in authorizing the filing of the applications involved here and in transmitting those authorizations under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, is detailed in the affidavits filed in the instant case (A. 128-133) and may be summarized as follows:

Whenever a formal request for authorization to apply for an interception order was received from attorneys or investigators in the field, the accompanying file, which included copies of the proposed affidavit, application and order, was examined in a special unit of the Organized Crime and Racketeering Section of the Criminal Division. The attorneys in that unit had as their primary function the review of such papers

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<sup>2</sup> "A." refers to the appendix filed in the court of appeals, a copy of which is being lodged with the Clerk.



for form and substance, with particular emphasis on assuring strict adherence to the required statutory, judicial and constitutional standards. After the file was examined by two attorneys, it was forwarded with their recommendations to the Deputy Chief or Chief of the Organized Crime and Racketeering Section, who added his recommendation. The file was then sent to the office of the Assistant Attorney General in charge of the Criminal Division where it was reviewed by a Deputy Assistant Attorney General, who made a judgment on the request on behalf of the Criminal Division.

The file, with the recommendation of the Criminal Division, then went to the office of the Attorney General, where the Executive Assistant to the Attorney General, Sol Lindenbaum, reviewed the file. In most instances the file, with Mr. Lindenbaum's recommendation added, was then sent in to the Attorney General for his personal authorization. In some instances, after becoming thoroughly familiar with the Attorney General's policy on such requests, and with the knowledge and approval of the Attorney General, Mr. Lindenbaum exercised the authority of the Attorney General in authorizing the application.<sup>3</sup>

When the files concerning the first interception request of October 16, 1970, were reviewed by Mr. Lindenbaum, he concluded from his knowledge of the Attorney General's actions in previous cases that the latter would approve the request. Since the Attorney

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<sup>3</sup> As we observe *infra*, n. 10, the Department of Justice in November 1971 revised the procedures to prohibit such authorizations.

General was not available, Mr. Lindenbaum approved the request. As he was authorized to do, he then caused the Attorney General's initials to be affixed to the memorandum addressed to the then Assistant Attorney General in charge of the Criminal Division, Will Wilson, informing him of the approval and designating him to authorize the attorney in the field to submit the application to a district judge (A. 129). The application for the extension order of November 6, 1970, was personally approved by the then Attorney General, John N. Mitchell, who personally initialed the memorandum addressed to Assistant Attorney General Wilson (A. 129).

After an application was authorized in the Attorney General's office, the file was sent back to the Criminal Division with the memorandum addressed to Assistant Attorney General Will Wilson directing him to perform the ministerial task of authorizing the particular trial attorney to submit the application to the court. A letter of authorization was then dispatched to the applicant over Assistant Attorney General Wilson's signature. Pursuant to the directions of Mr. Wilson, and in accord with the general procedure followed in the Department of Justice, his signature was affixed to the letters for both applications by a delegate, in this instance Deputy Assistant Attorney General Harold P. Shapiro (A. 133).<sup>4</sup>

<sup>4</sup> The affidavit filed in the district court did not specifically state that Shapiro signed Wilson's name to the letters. It was the practice at that time, however, that the Deputy Assistant Attorney General who reviewed the file and made the recommendation also caused Wilson's signature to be affixed to the letter.

After a hearing, the district court issued an opinion (App. D, *infra*, pp. 23a-77a) and order (App. C, *infra*, pp. 21a-22a) suppressing the evidence obtained from the wiretaps on the grounds that the officer authorizing the applications was not properly identified in the application and order as required by 18 U.S.C. 2518(1)(a) and 2518(4)(d). This ruling was based on the fact that the affidavit seeking the order and the attached letter from the Department of Justice gave the inaccurate impression that the substantive decision to allow the field attorney to seek a wiretap order had been that of Assistant Attorney General Wilson. The government appealed and the court of appeals affirmed on a different ground. The court of appeals held that the initial application for the wire interception order of October 16, 1970, was not properly authorized to be submitted to the court as required by 18 U.S.C. 2516(1) since the Attorney General did not himself personally authorize that interception.

#### REASONS FOR GRANTING THE WRIT

These cases involve the construction of several sections of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520) establishing statutory procedures for the obtaining of wiretap orders. The interpretation of the authorization statute (18 U.S.C. 2516(1)) by the court below is in direct conflict with the recent decisions of the Second Circuit in *United States v. Pisacano*, petition for a writ of certiorari pending, No. 71-1410, and *United States*

v. *Becker*, petition for a writ of certiorari pending, No. 72-158.<sup>5</sup>

Moreover, if the decision in this case is followed by other circuits it would result in suppression of wiretap evidence in many pending cases and cause a major disruption of the government's efforts to

<sup>5</sup> We are filing a supplemental memorandum in those cases stating that, in view of the decision in the instant case, we do not oppose the granting of certiorari in those cases. Since the issues in these three cases are essentially the same, the Court may wish to consolidate them for consideration.

The issue of the validity of the procedure under which Sol Lindenbaum, acting for the Attorney General, authorized the submission of wiretap applications to the issuing court was initially raised in *United States v. Robinson*, 468 F. 2d 189 (C.A. 5), rehearing *en banc* granted, July 21, 1972. The panel of the Fifth Circuit in that case held that the procedure did not comply with the statute and ordered the evidence from the court-authorized wiretaps suppressed. The government's petition for rehearing, which set forth the authorization procedure in more detail, was granted, and on October 31, 1972, the case was reargued before the Fifth Circuit, *en banc*. On January 16, 1973 the *en banc* court entered a *per curiam* order remanding the case to the district court for an evidentiary hearing. The court apparently denied the government's motion to supplement the record on appeal with the affidavits filed with the rehearing petition, and considered only the original affidavits as properly before it. The court declined to resolve an issue of such importance on the existing record.

This same issue is also pending before the Third Circuit *en banc* in *United States v. Cihal*, No. 72-1291 (C.A. 3). After oral argument before a panel in *Cihal*, the Third Circuit, on its own motion, ordered the case listed for reconsideration *en banc*. No decision has been rendered in that case yet. In *United States v. Bassoline*, No. 72-1600 (C.A. 6), and *United States v. Aquino*, No. 72-1716 (C.A. 6), the Sixth Circuit entered an order on December 14, 1972, after oral argument, noting that the same issue was pending on petitions for certiorari in this Court and ordering consideration of those appeals stayed pending disposition of the certiorari petitions.

control organized crime.<sup>6</sup> In these circumstances, action by this Court is required to resolve the conflict in the circuits and to afford authoritative guidance in pending cases.

1. The court of appeals held that the authorization of the application by the Attorney General's Executive Assistant, Sol Lindenbaum, acting in the Attorney General's name, with the Attorney General's permission, and with the Attorney General remaining fully responsible for the authorization, did not comply with Title III. This decision turns on an interpretation of 18 U.S.C. 2516(1), which provides in pertinent part:

The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application

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<sup>6</sup> Essentially the same issue is presented in eighteen cases now pending in courts of appeals and thirty-five cases in which motions to suppress on this same ground have been filed in various district courts. In each of these cases, one or more of the applications for wire interception orders were authorized for submission to the court by Sol Lindenbaum, Executive Assistant to the Attorney General, under the procedure set forth in the statement.

There are also sixteen cases pending in courts of appeals and sixty-five cases pending in district courts in which the same issue has been raised but in which suppression would not be required under this opinion since former Attorney General Mitchell personally authorized all of the applications in those cases. These latter cases present the same situations as in *United States v. Cox*, 462 F. 2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72-5278, in which we continue to oppose the granting of certiorari for the reasons stated in our brief and supplemental memorandum in that case. A summary of the outstanding cases in the courts of appeals in which the issue of the authorization procedure has been raised is presented in App. E, *infra*, pp. 78a-80a.

to a Federal judge of competent jurisdiction for \* \* \* an order authorizing \* \* \* the interception of wire or oral communications \* \* \*.

The legislative history of the statute makes clear that the purpose of this section—and of the provisions in 18 U.S.C. 2518(1)(a) and (4)(d) which require the authorizing officer to be identified in the application and order—was to fix responsibility for the policy decision under which the wiretap authority was sought. The intent was to focus the responsibility on an official who is accountable to Congress (S. Rep. No. 1097, 90th Cong., 2d Sess., at 97, 101, 103). In the instant case, under the established procedure, then Attorney General Mitchell was personally responsible for the actions taken on both applications. Thus the procedure the Department followed here actually satisfied the congressional intent of insuring that a consistent policy with respect to wiretapping be established and carried out and it is clear that the lines of responsibility can readily be traced through the orders, applications, letters of authorization, and memoranda of authorization, to former Attorney General Mitchell, the responsible officer. See *United States v. Pisacano*, *supra*, 459 F. 2d at 263.

The fact that the then Attorney General did not, in this case, himself personally authorize the initial application did not defeat this congressional purpose. Under the provisions of 28 U.S.C. 510, the Attorney General may authorize an officer of the Department of Justice to perform "any function of the Attorney General." Nevertheless, in keeping with the congressional spirit expressed in 18 U.S.C. 2516, the Attorney General, in order to avoid the possibility that diver-

gent practices might develop and to centralize the policy judgment, did not designate any official outside of his own office to make operative wiretap decisions. Instead, he only went so far as to permit his own Executive Assistant, Sol Lindenbaum, who functioned as his alter ego in such matters, to act on applications when the Attorney General was unavailable. As the Second Circuit held in *Pisacano*, authorizations made under these circumstances should be treated as complying with the requirements of Title III. The court below expressly refused to follow that decision and thus generated a conflict.

A comparison of the provisions of 18 U.S.C. 2516(1) with those of 18 U.S.C. 245(a)(1) (the Civil Rights Act of 1968),<sup>7</sup> enacted by the same Congress, shows that the procedure here followed was not prohibited by Congress. As Section 245(a)(1) shows, when Congress wished to provide for only personal action as well as personal responsibility, it expressly stated that the function "may not be delegated." No such language is contained in the instant statute. Thus, in affirming the suppression order in this case, the court of appeals interpreted the provision of 18 U.S.C. 2516(1) in a literal and highly technical manner which, we submit, is not necessary to achieve the congressional purpose of

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<sup>7</sup> 18 U.S.C. 245(a)(1) provides:

\* \* \* No prosecution of any offense described in this section shall be undertaken by the United States except upon the *certification in writing of the Attorney General or the Deputy Attorney General* that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, *which function of certification may not be delegated* [emphasis added].

fixing full responsibility and accountability. It is clear that under the procedures followed here former Attorney General Mitchell was personally responsible for both applications—despite the fact that the first was initialed by his Executive Assistant. No congressional policy would be served by holding the warrant invalid because of the internal procedures of the Department of Justice, where those procedures did not detract from full accountability and responsibility in the Attorney General.<sup>8</sup>

2. We urge further that the holding of the court of appeals that suppression of the wiretap evidence was required in this case because the initial application was signed by the Attorney General's Executive Assistant, overlooks the critical fact that the interception was conducted under a court order after a finding of probable cause by the issuing judge. The determination of the court below that, despite this, the order must fall rests on an unduly expansive reading of the suppression provisions of Title III, 18 U.S.C. 2515 and 2518(10)(a).

The requirement for authorization of the application before it is submitted to the court is not a Fourth Amendment requirement. See *Berger v. New York*,

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<sup>8</sup> For similar reasons, we submit that the district court was in error in suppressing the evidence obtained as a result of these wiretaps because Assistant Attorney General Wilson was incorrectly identified as the official personally responsible for the decision to seek an order. As indicated in *Pisacano, supra*, 459 F. 2d at 264, n. 5, and in *United States v. Becker, supra*, 461 F. 2d 230, 235 (C.A. 2), to the extent the application did not indicate that it was the Attorney General who was responsible for the authorization, this defect did not subvert the congressional purpose, and was, at most, harmless error.



388 U.S. 41, 60; *Katz v. United States*, 389 U.S. 347, 356-359. Such authorization by a prosecutorial officer is not intended as a safeguard for the individual's privacy. That function rests with the issuing judge. See Congressional Findings, Section 801(d), Public Law 90-351, 82 Stat. 211-212. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-453. Rather, the goal is, as we have seen, to fix responsibility for the wiretap policy in an identifiable person in order to hold that person accountable to Congress, and this purpose was substantially achieved by the procedures followed here. Therefore, we submit, any error which the government may have made in interpreting the statute should not require the drastic remedy of suppression. There is no reason to grant the defendants in this case a right to assert the interests of Congress and the public at large in the review of the practice followed by the Department in authorizing wiretap applications to be submitted, where the basic finding of probable cause is not tainted by this procedure.

The court below held that suppression was required under the provisions of 18 U.S.C. 2515 and 18 U.S.C. 2518(10)(a). Although the exclusionary rule of 18 U.S.C. 2515 appears absolute on its face, the Senate Report makes it clear that it was only intended to reflect existing law. S. Rep. No. 1097, 90th Cong., 2d Sess., at 96.<sup>9</sup>

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<sup>9</sup> This Court has previously considered Section 2515 in *Gelbard v. United States*, 408 U.S. 41. In that case, however, the Court assumed that the communications were not intercepted in accordance with the provisions of Title III and that the testimony sought in that case would be a disclosure in violation of the statute. That decision, therefore, does not reach the issue

Under Section 2518(10)(a) a motion to suppress may be brought on the grounds that (1) the interception was unlawful, (2) the order was insufficient on its face, or (3) the interception was not made in conformity to the order. The court of appeals here held that the authorization by Mr. Lindenbaum was invalid and thus that the identification of the authorizing officer was the equivalent of failing to identify anyone, which therefore rendered the order invalid on its face (App. A, *infra*, p. 19a). The court also held that the communications were unlawfully intercepted. We submit that these findings expanded the definition of the term "unlawful" beyond what Congress intended and would lead to suppression of a wiretap where there was any technical deviation from the statute, a result clearly not intended by Congress. See *United States v. Wolk*, 466 F. 2d 1143 (C.A. 8) (holding that, since no prejudice was shown, and the government had substantially complied with the wiretap statute, evidence should not have been suppressed). Moreover, since the substance of the affidavit presented to the district judge established probable cause, the absence of actual personal approval by the Attorney General hardly rendered the judge's order invalid "on its face."

The opinion below is primarily concerned with "the future consequence of sanctioning an alternative scheme which could be abused hereafter." (App. A, *infra*, p. 13a) But, even though we maintain that the

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of the scope of the suppression provision with respect to a wire interception conducted under a court order issued on a showing of probable cause.

procedure followed here with respect to the authorization by the Attorney General's Executive Assistant did comply with the statute, the Department has revised that procedure to provide for literal compliance with 18 U.S.C. 2516(1).<sup>10</sup> There is thus no practical possibility that "in some future case" the Attorney General could repudiate the action of his assistants and destroy the concept of individual responsibility (App. A, *infra*, p. 13a).

3. Although the application to extend the interception order was personally authorized by the Attorney General, the court of appeals affirmed the suppression of evidence from this wiretap, as well as from the original wiretap, without stating any particular reason for that suppression. Even if the authorization by the Executive Assistant was invalid under the statute, and even if suppression of evidence from *that* wiretap was necessary, it does not follow that evidence from the extension must also be suppressed.

The affidavit for the extension order reasserted the facts, details, and conclusions contained in the prior affidavit for the order of October 16, 1970. These facts were found by the district court to constitute probable cause for the issuance of that order (App.

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<sup>10</sup> The procedure was revised in November 1971. All of the cases in which this issue is controlling, therefore, are cases in which the wire interceptions occurred before that time. Nonetheless, as we have pointed out, there is great practical importance to this issue because of the substantial number of cases involved. See App. E, *infra*. Five hundred wiretap orders were entered by federal courts from 1969, when the Department of Justice first utilized the wire interception authority under 18 U.S.C. 2510-2520, until the end of 1971.

D, *infra*, p. 55a). In the November 6 affidavit, moreover, these facts were augmented with details of an October 17, 1970 sale of heroin by Giordano to an undercover agent, as well as the results of the prior wiretap as required by 18 U.S.C. 2518(1)(e) and 2518(1)(f). Even if all facts derived from the October 16 wiretap were excised, there still remained probable cause to issue the November 6 order, and that order was personally authorized by the then Attorney General.

Since 18 U.S.C. 2515 reflects existing search and seizure law, its prohibition against the use of derivative evidence from an illegal wiretap incorporates the "fruit of the poisonous tree" doctrine. Under that doctrine, we submit, the second authorization was independently valid and untainted by the first. But even if this Court were to find that the evidence discovered as a result of the October 16 wiretap was necessary to establish probable cause for the later interception, suppression is not in order. The Attorney General specifically assumed full responsibility for the earlier Giordano wiretap when he authorized the wiretap of November 6, 1970. At least in such circumstances, any defect in the earlier court-authorized wiretap was purged and the extreme sanction of suppression should not be imposed. See *United States v. Bacall*, 443 F. 2d 1050, 1059-1061 (C.A. 9), certiorari denied, 404 U.S. 1004.

## CONCLUSION

Because of the explicit conflict among the circuits and the substantial practical importance of the issues, this petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

HENRY E. PETERSEN,  
*Assistant Attorney General.*

JEROME F. FEIT,  
JOHN J. ROBINSON,  
*Attorneys.*

JANUARY 1973.

APPENDIX A

**In the United States Court of Appeals  
for the Fourth Circuit**

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No. 72-1399

UNITED STATES OF AMERICA, APPELLANT

v.

DOMINIC NICHOLAS GIORDANO, ALSO KNOWN AS NICK  
GINO, ALSO KNOWN AS P. BURDI, ALSO KNOWN AS  
NICK GIORDINA, APPELLEE

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No. 72-1407

UNITED STATES OF AMERICA, APPELLANT

v.

DOMINICK NICHOLAS GIORDANO, A/K/A NICK GINO,  
A/K/A P. BURDI, A/K/A NICK GIORDINA; JAMES AL-  
BERT WALLACE, A/K/A BUFFALO REDS, A/K/A REDS;  
HERMAN LEE PETTIFORD, A/K/A SKEETS, A/K/A SKEE-  
ZIE; RONALD E. BLACKWELL; MARGARET HARRIS,  
A/K/A PAT; STANLEY SILVERSTEIN; SAMPSON WIL-  
LIAMS; ROY LEE DAVIS, A/K/A MR. FAIRCHILD, A/K/A  
FAIRCHILD; JACK BALDWIN, APPELLEES

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*Appeals from the United States District Court for  
the District of Maryland, at Baltimore, James R.  
Miller, Jr., District Judge*

(Argued September 13, 1972—Decided October 31,  
1972)

Before SOBELOFF, *Senior Circuit Judge*, and WINTER and BUTZNER, *Circuit Judges*.

Francis S. Brocato, Assistant United States Attorney, (George Beall, United States Attorney, on brief) for Appellant in No. 72-1399 and No. 72-1407; and John A. Shorter, Jr., (Court-appointed counsel) for Appellee, Sampson Williams, in No. 72-1407; H. Russell Smouse (Court-appointed counsel) for Appellee, Dominic Nicholas Giordano, in No. 72-1399 and No. 72-1407; and [Arthur G. Murphy, Sr., (Court-appointed counsel) for Herman Lee Pettiford, and Phillip M. Sutley on brief] for Appellees in No. 72-1407.

SOBELOFF, *Senior Circuit Judge*:

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ["Act"], lays down a stringent step-by-step procedure that circumscribes and limits all electronic surveillance. The scheme was intended to allay the profound concern expressed by the Supreme Court in such cases as *Berger v. New York*, 388 U.S. 41 (1967) over electronic intrusions into privacy. Speaking for the Court, Mr. Justice Clark had observed that "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Id.* at 63. Accordingly, Title III conformed its prescribed procedures in seeking leave to engage in electronic surveillance to the constitutional standards elucidated in *Berger v. New York*, *supra*, and *Katz v. United States*, 389 U.S. 347 (1967). The question raised here is the extent to which the Government must adhere to the letter of that statutory scheme in authorizing applications and obtaining orders permitting the interception of wire communications.

## I

On October 16, 1970, Frances S. Brocato, an assistant United States Attorney, presented to Chief Judge Edward S. Northrop of the United States District Court for the District of Maryland an application<sup>1</sup> for authorization to intercept wire communications to and from a telephone listed in the name of Nicholas Giordano. To one uninitiated in the "Alice in Wonderland" world of Justice Department wiretap applications, the documentation<sup>2</sup> presented to Judge

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<sup>1</sup> Paragraph Two of the affidavit and application of Francis S. Brocato, Assistant United States Attorney for the District of Maryland, states:

"Pursuant to the power conferred upon him by § 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A."

See note 2, *infra*.

<sup>2</sup> The letter accompanying the Brocato affidavit, *supra* note 1, dated October 16, 1970, and purporting to bear the signature of Will Wilson, reads in pertinent part as follows:

"This is in regard to your request for authorization to make application pursuant to the provisions of § 2518 of Title 18, United States Code, for an order of the court authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications. \* \* \*

"I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Nicholas Giordina and others as yet unknown have committed, are committing, or are about to commit offenses. \* \* \* I have further determined that there exists probable cause to believe that the above person makes use of the described facility in connection with those offenses,



Northrop—the Brocato affidavit and the purported Will Wilson letter—would indicate that the then Attorney General, John N. Mitchell, had specially designated Assistant Attorney General Will Wilson to authorize the Giordano wiretap; and that Wilson had reviewed the “facts and circumstances” and determined that there existed sufficient probable cause to justify the surveillance. The recitals in the Brocato affidavit and the Will Wilson letter were tailored to fit within the statute’s terms. In fact, however, neither Mitchell nor Wilson had heard of the Giordano application or signed the letters bearing their respective initials and signature.<sup>3</sup> The Government itself now concedes that the assertions in the affidavit and letter misrepresented the truth.

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that wire communications concerning the offenses will be intercepted, and that normal investigative techniques reasonably appear to be unlikely to succeed if tried.

“Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by § 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an order of the court pursuant to § 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications from the facility described above, for a period of 21 days.”

<sup>3</sup> When Mr. Brocato presented to Judge Northrop his affidavit and the Will Wilson letter upon which it was based, he believed the truth of the recitals therein contained. Later, the veracity of his submissions having been challenged, Brocato investigated the origins of the Wilson letter and represented to the court below that Mr. Will Wilson did not sign the Giordano application or almost any Title III application bearing Wilson’s purported signature. He told Judge Miller that “Will Wilson made no determinations at any point, and it’s very surprising if you find a letter which was signed by Will Wilson. In fact, we were trying to find out—I recall personally

Acting upon the application and what appeared in the accompanying papers, Chief Judge Northrup authorized the wiretap "pursuant to application authorized by \* \* \* Will Wilson, who has been specially designated in this proceeding by \* \* \* John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18 \* \* \*." The order was extended on October 22 and November 6, and then voluntarily terminated by the Government on November 18 when Giordano and others were arrested and charged with narcotic violations. The defendants filed motions claiming that the Government's application for the October 16 order was fatally defective in that it had not been properly authorized. They therefore demanded the suppression of the contents of any intercepted telephone communications and derivative evidence. The motions were referred to District Judge James R. Miller, Jr., who, after lengthy hearings, ordered suppression and filed a detailed memorandum opinion explaining his reasons. 340 F. Supp. 1033 (D. Mr. 1972). The Government here appeals from Judge Miller's order.\*

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when we were trying to find out who signed the Will Wilson, and [someone] indicated maybe Will Wilson signed it, and everyone laughed." [Hearing February 8, 1972, Tr. 56.] The Government concedes that Will Wilson did not authorize the application and since the Attorney General never designated any Assistant Attorney General to authorize wiretap applications, which would have involved publication of the delegation in the Federal Register, only Attorney General Mitchell had the requisite authority to authorize the application. [*Id.* at 43.]

\*The facts presented are not novel. The same issue has been before several different courts under a variety of factual circumstances. The issue was resolved against the Government in *United States v. Robinson* (5 Cir. Jan. 12, 1972) rehearing granted en banc July 21, 1972); *United States v. Cihal*, 336 F. Supp. 261 (W.D. Pa. 1972), appeal docketed No. 72-1201 (3 Cir. April 13, 1972); *United States v. Aquino*, 338 F. Supp.

The fundamental issue to be resolved is whether the Giordano wiretap was properly authorized as required by 18 U.S.C. § 2516(1)), which reads:

The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications \* \* \*.

The defendants contend that the Government has failed to comply with the requirements of this section because the source of the requisite wiretap authorization was not the then Attorney General John N. Mitchell, but his executive assistant, Sol Lindenbaum. The Government concedes that Mr. Lindenbaum not

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1080 (E.D. Mich. 1972); *United States v. Baldassari*, 338 F. 904 (M.D. Pa. 1972); *United States v. Narducci*, 341 F. Supp. 1107 (E.D. Pa. 1972); *United States v. Smith*, — F. Supp. — (N.D. Ill. 1972); *United States v. Mantello*, — F. Supp. — (D. D.C. 1972).

The Government's position was upheld in *United States v. Piscano*, 159 F. 2d 259 (2 Cir. 1972). A subsequent panel of the Second Circuit wrote: "We feel bound to follow *Piscano*, especially since it is so recent and the facts before the court there are indistinguishable \* \* \*. Our adherence to the law of the circuit, as thus established, is not to be construed as an approval of 'he procedures followed by the Attorney General and his staff \* \* \*.'" *United States v. Becker*, — F. 2d —, — (2 Cir. 1972). Lower court opinions accepting the Government's position have been *United States v. King*, Criminal Nos. 11627 and 11257 (no written opinion yet filed) (S.D. Cal. 1972); *United States v. Gibson*, Criminal No. 7672A (E.D. Va. 1972) (no written opinion); and the *United States v. Lawson*, — F. Supp. — (E.D. Pa. 1972).

We have read these decisions carefully, and while this court is not bound by any of them, we do think that those holding against the Government are the better reasoned.

only authored the memorandum of approval, but also penned thereon the Attorney General's initials ("JNM").

## II

The procedures followed in the instant case, as outlined by the Government in affidavits submitted to Judge Miller, included a request for authorization by the Director of the Bureau of Narcotics, and subsequent review and favorable recommendation of this application by the Deputy Chief and Chief of the Organized Crime and Racketeering Section of the Department of Justice and the Deputy Assistant Attorney General. Since Attorney General Mitchell had not designated an Assistant Attorney General to authorize without his approval the filing of wiretap applications, the application was referred to him for his consideration and approval. In accordance with office procedure, Sol Lindenbaum, Mr. Mitchell's executive assistant, reviewed the case in order to make recommendations to the Attorney General. The request for approval in this case came in while Mitchell was away from Washington. According to Lindenbaum's affidavit furnished to Judge Miller, Lindenbaum reviewed the application in the Attorney General's absence and concluded from his knowledge of the Attorney General's previous actions that Mitchell would sign. The Government's brief then alleges that "pursuant to authorization given to [Lindenbaum] by the Attorney General to act 'in the circumstances,'" Mr. Lindenbaum approved the request and signed Mitchell's initials on a memorandum directing that application be made to set up a wiretap on Giordano's phone.

Despite the fact that neither the Attorney General nor any Assistant Attorney General authorized the application, the Government contends that the appli-

cation was properly authorized and that the spirit, if not the letter, of 2516(1) was observed. The Government's argument may be described as an "alter ego theory." The contention is that Lindenbaum should be treated as Mitchell's alter ego with respect to wiretap applications at times when the Attorney General was unavailable. The Government maintains that while the Attorney General granted to his trusted confidant in the Title III area permission to authorize applications in his absence, the Attorney General, nevertheless, did not delegate the responsibility for the action. Since the Attorney General retained responsibility for the authorization, the argument continues, the primary legislative purpose of 2516(1)—that a line of responsibility lead to a clearly identifiable person—is met. In urging this theory upon the court, the Government stresses the increase in recent years in the number of applications for wiretaps and the impossibility of one man personally exercising all the statutory functions of an office such as the Attorney Generalship.

### III

The argument that Mr. Lindenbaum's approval of the application for permission to wiretap fulfills the statutory requirements of Section 2516 must fail.

#### A. LEGISLATIVE HISTORY

The legislative history of Section 2516, while not determinative, is indeed enlightening. Prior to 1968, wiretapping and eavesdropping legislation had been introduced in several sessions of Congress. Especially illuminating is a review of S. 1495 presented in the 87th Congress, 1st Session, in 1961. Section 4(b) of this bill, as originally proposed, provided that:

The Attorney General or any officer of the Department of Justice or any United States attorney specially designated by the Attorney General, may authorize any investigative law enforcement officer of the United States or any Federal agency to apply to a judge of competent jurisdiction for leave to intercept wire communications \* \* \*.

On June 21, 1961, the Department of Justice submitted to Congress a proposed revision of S. 1495 which, for the first time, included precisely the same operative language as the present § 2516(1) of Title 18, United States Code. The Department of Justice proposed to modify § 4(b) of S. 1495 to read as follows:

The Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, may authorize an application to a judge of competent jurisdiction \* \* \*. *Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Wiretapping and Eavesdropping Legislation, 87th Congress, First Session (May 9, 10, 11, 12, 1969) at 372.*

The Justice Department's revision of the wording of Section 4(b) of S. 1495 followed the testimony of Herbert J. Miller, Jr., Assistant Attorney General, Criminal Division of the Department of Justice, at hearings on the bill in May, 1961. He testified that the Department felt that the authorization provision in S. 1495 was too broad and suggested that the range of officials who might authorize wiretaps be sharply curtailed—limited to the Attorney General and Assistant Attorneys General specifically designated for the purpose. The motivation for this change was to "give greater assurance of a responsible executive determination of the need and justifiability of each interception." Confining the authority to authorize wiretap ap-

plications to a carefully delineated high echelon of officials within the Justice Department was apparently considered the means to accomplish this end. The pertinent testimony of Miller in this regard bears repeating:

This is the approach of S. 1495, with which the Department of Justice is in general agreement. The bill makes wiretapping a crime unless specifically authorized by a Federal judge in situations involving specified crimes. As I understand the bill, the application for a court order could be made only by the authority of the Attorney General or an officer of the Department of Justice or U.S. Attorney authorized by him. *I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any Assistant Attorney General whom he may designate. This would give greater assurance of a responsible executive determination of the need and justifiability of each interception. Id. at 356. (Emphasis added.)*

The language of the Justice Department recommendation was incorporated verbatim in all subsequent proposals and became part of S. 917 which contained the text of Title III as it was eventually enacted by the Congress. The Senate Report, in referring to § 2516(1) further reveals the concern of Congress in limiting the individuals who might authorize wiretap applications. It states:

Paragraph (1) provides that the Attorney General, or any Assistant Attorney General of the Department of Justice specifically designated by him, may authorize an application for an order authorizing the interception of wire or oral communications. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronics surveil-

lance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable *person*. This provision in itself should go a long way toward guaranteeing that no abuses will happen. (Emphasis supplied.) 1968 U.S. Code Congr. & Adm. News, p. 2185.

The passage conveys the congressional intention to limit the initiation of wiretap applications to "a publicly responsible official subject to the political process." While the Attorney General and his nine assistants are subject to the "political process" in that they must be approved by the Senate; the executive assistant to the Attorney General need not secure confirmation. He is appointed by and serves at the will of the Attorney General.

Because of the delicate nature of the power to initiate electronic surveillance applications, the implementation was reserved to designated officials of a certain rank within the Justice Department. It does not matter whether Mr. Lindenbaum is a man of integrity; he is not an official who has been subjected to the "political process"—Senate confirmation. His approval of a wiretap authorization does not fulfill the congressional mandate. Additionally the alter ego theory is open-ended. It need not stop with Lindenbaum, but could be extended with an equal claim of validity to anyone within or without the Department of Justice. In determining who qualifies as an alter ego, it would permit sidestepping the congressional mandate fixing the level of those who may be designated to authorize applications.

#### B. EXECUTIVE LEGISLATION

The Government spins its argument in an attempt to justify what has been done, but the procedure that



was followed does violence to the congressional design. It is argued that this does not matter, since the safeguards of the statute are effectively paralleled in the practice followed by the Justice Department. This is tantamount to arguing that the clearly expressed congressional will may be set aside in favor of an alternative scheme which in the eyes of the administrators is just as good or better. Such legislation by the Executive Department violates the separation of powers doctrine and is not to be tolerated.

The Government buttresses its argument by citing the phalanx of enforcement agents who joined in recommending the application for a wiretap. On closer scrutiny this is seen to be just another attempt to justify substituting legislation by the Executive in place of that enacted by Congress.

The language of the statute repels any suggestion that the Congress meant to sanction an alternative procedure that might be deemed acceptable by the Justice Department. Could the congressional purpose to tighten the law and rigidly confine authorizations to seek wiretaps be expressed more plainly? The statutory terms evidence a firm intention to strengthen and not to weaken the expressed restrictions. We perceive no warrant for the interpretation urged upon us by the Government.

#### C. IDENTIFIABLE RESPONSIBILITY

Congress also sought to centralize the decision making process in the area of electronic surveillance to effectuate a unitary policy and, even more importantly, to establish a clear line of responsibility. By making an official subject to the "political process" publicly responsible for each and every wiretap, Congress sought to provide the individual with yet another safeguard to insure that the awesome power of

electronic surveillance be exercised with circumspection.

The Government argues that Attorney General Mitchell created departmental policy which Lindenbaum faithfully carried out. It is further called to our attention that Mitchell, since the question of the lawfulness of Lindenbaum's procedure in authorizing wiretap applications has achieved public attention, has accepted responsibility for the Giordano and other wiretaps. Congressional policy is once more said to have been fulfilled by alternative means.

These contentions again miss the mark for they are based on untenable assumptions. The premise is that future alter egos will always act within guidelines created by the Attorney General and that future Attorneys General will then always acknowledge responsibility for authorizations penned in their names. Our concern here is not primarily with past action of a former Attorney General, but rather the future consequence of sanctioning an alternative scheme which could be abused hereafter to evade the congressional policy of locating responsibility for wiretap applications with the Attorney General and a limited number of his designated assistants. If we should accept the Government's reasoning, there can be no assurance that in some future case, if the particular wiretap authorization proved politically embarrassing, the Attorney General would not then repudiate his "Lindenbaum." The Attorney General would always be able to say with the benefit of hindsight that the subordinate had betrayed his confidence, acted beyond the scope of his responsibility, and the actions taken were not those of an agent. The alter ego theory destroys the concept of establishing identifiable individual responsibility at a certain level of government.

## D. PROLIFERATION OF APPLICATIONS

The Government submits that the proliferation of wiretap applications has made the personal attention of the Attorney General to each case an impossibility. Therefore, it is urged that Mr. Lindenbaum properly could act for the Attorney General. But we are not dealing with the question of subdelegation in the abstract. Before us is a specific statute which says who can act in the place of the Attorney General. It is a long-recognized rule of statutory construction that the enumeration of certain things implies the exclusion of all others, *expressio unius est exclusio alterius*. "Generally speaking, a 'legislative affirmative description' implies denial of the non-described powers." *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942). The congressional limitation excludes any individuals not specifically enumerated in § 2516 from the group who might properly authorize wiretap applications. *Only* the Attorney General or a specially designated Assistant Attorney General may authorize such applications.

Congress was not blind to the possible burden entailed in requiring the personal attention of the Attorney General in each and every wiretapping instance. Recognizing the ever-increasing responsibilities of the office, a safety valve was provided. The Attorney General might designate one or more of his Assistant Attorneys General to handle the burgeoning number of wiretap applications, to authorize them in his absence, or he might make designations on an *ad hoc* basis. Conceivably, the position of Assistant Attorney General in charge of all electronic surveillance could have been created. The Attorney General could choose any Assistant Attorney General to serve as his "alter ego" and could delegate his responsibility in the area under a variety of

schemes; but he could not annoint his executive assistant to serve as his alter ego. Congress deliberately limited the Attorney General's range of choice. Under these circumstances, the Attorney General cannot claim that the burdens of his office made it necessary to permit his executive assistant to weigh the facts of a case and authorize wiretap applications without his personal knowledge.

#### IV

In his able opinion, 340 F. Supp. 1033 (D. Md. 1972), Judge Miller traced the legislative history of §§ 2518(1)(a)<sup>5</sup> and 2518(4)(d)<sup>6</sup> of Title III in addition to the history of § 2516(1), and concluded that the statutory scheme sets up a two-step process. First, the application for a wiretap must be authorized in accordance with 2516(1)—by the Attorney General or a specially designated Assistant Attorney General. Second, the identity of the person authorizing the application must be made known to the judge acting on the application, and, ultimately, through the text

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<sup>5</sup> Title 18, Section 2518(1)(a). United States Code, requires:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application; \* \* \*

<sup>6</sup> Title 18, Section 2518(4)(d) states:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; \* \* \*

of the judge's order, to all other interested parties. In Judge Miller's view the two steps are of equal importance in the legislative scheme. Consequently, he resolved the case without determining whether the wiretap application in this case was properly authorized—the basis of our decision today. Judge Miller granted the motion to suppress because the application to Judge Northrop and his subsequent order mistakenly stated that the authorizing party was Assistant Attorney General Will Wilson.

Most other courts<sup>7</sup> have followed another approach in deciding the issue of compliance with 2518(1)(a) and 2518(4)(d). These courts have said that once the Government has proved that Mitchell properly authorized the initial application, the fact that the Judge might have been told that Will Wilson rather than Mitchell was the source of the authorization was a matter of form, not substance. But here, there was no proper authorization at all. Neither Mitchell, nor Will Wilson—nor any Assistant Attorney General for that matter—authorized the Giordano wiretap application.

Perhaps it can plausibly be argued that when an application is properly authorized and only the identity of the source is mistakenly transmitted to the judge, he would have authorized the wiretap had

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<sup>7</sup> See, e.g., *United States v. LaGorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. Aguino*, 336 F. Supp. 737 (E.D. Mich. 1972); *United States v. Doolittle*, 341 F. Supp. 164 (M.D. Ga. 1972); *United States v. Gerodemos*, — F. Supp. — (N.D. Ind. 1972); *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972); *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1972); *United States v. D'Amato*, 340 F. Supp. 1020 (E.D. Pa. 1972); *United States v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972). *Contra United States v. Casale*, 341 F. Supp. 374 (M.D. Pa. 1972), *reversed sub nom. United States v. Ceraso*, — F. 2d — (3 Cir. 1972).

he known the real facts. But where in the first place there is no proper authorization, this argument is unavailable. If Judge Northrop had been aware of the real status of the application, that neither Mitchell nor Wilson even knew of it, and that the application had been approved and initialed "JNM" by Lindendbaum, we are certain that he would have refused to permit the wiretap.

Acceptance of the government arguments would negate much of Title III. Section 2516 could be fulfilled by anyone; the Government could extend the alter ego argument apparently without limit. Section 2518(1) (a) (requiring that the Judge be informed of the identity of the person authorizing the application) and section 2518(4)(d) (requiring the Judge to state this information in his wiretap order) could be ignored. One is prompted to ask what would be left of the statutory scheme designed to protect the individual from potential governmental abuse—except the assurances of government officials themselves. We agree with Judge Becker, who stated in *United States v. Narducci*, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972), that "the necessity for strict compliance with the statute in a wiretap situation stems just as much from the precedent-setting example of condoning laxity which could lead to further laxity in years to come, with serious consequences to personal liberties, as from concern over the rights of the accused in a given case."

To summarize: Congress enacted the various sections of Title III for a purpose. It wanted only specially designated persons of a certain stature within the Justice Department to initiate applications; it directed that the identity of the individual be transmitted to the authorizing magistrate so that he could be certain on whom he was relying; and it wanted

the name of the authoriizing individual stated in the judicial order so that interested parties might later be able to trace the line of responsibility. We cannot relegate provision after provision to oblivion by terming each a mere "technicality"—or else we leave the statute a shadow of itself, an apparition without substance.

## V

As a last resort, the Government submits that even if the authorization procedures used were deficient and the application and subsequent wiretap order irregular and misleading in some respects, "there is no reason to apply the drastic remedy of suppression to correct a technical defect in procedure." This is a beautiful example of the bootstrap technique. First the Government minimizes the violation of the various statutory provisions involved, characterizing them as "technical defects," and then in typical bootstrap fashion postulates that for minor violations there should be no sanctions. The defects in this case, however, go to the very heart of Title III. The statute imposes an overall ban on electronic surveillance except under certain circumstances pursuant to specific procedures—which are not mere technical steps along the way. Section 2515 of 18 U.S.C. then declares unequivocally:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial \* \* \* before any court \* \* \* *if the disclosure of that information would be in violation of this chapter.* (Emphasis added.)

The means to implement the sanction created by section 2515 is then provided by 18 U.S.C. § 2518(10) (a), which directs that a motion to suppress shall be



granted whenever (1) the communication was unlawfully intercepted; (2) the order of authorization or approval under which it was intercepted is insufficient on its face; or (3) the interception was not made in conformity with the order of authorization or approval. If the order had failed to identify the person who authorized the application, it would have been insufficient on its face, requiring suppression of the evidence. Here, however, there was no authorization at all, which is the equivalent of failing to identify anyone. Furthermore, the pattern of the Government's behavior in ignoring statutory requirement after statutory requirement necessarily leads to our determination that any communications derived from the wiretap were unlawfully intercepted and therefore properly suppressed.

It is appropriate here to recall Justice Brandeis' famous admonition given nearly forty-five years ago in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting), that when "government becomes a law-breaker, it breeds contempt for the law." Similarly, when government consistently tramples upon those parts of the law that do not suit its momentary purpose and seeks to justify its conduct by sophistic argumentation, neither respect for the law nor societal order is promoted. Accordingly, we affirm the order of the District Court suppressing the fruit of the wiretaps in these cases.

*Affirmed.*



## APPENDIX B

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United States Court of Appeals for the Fourth Circuit

No. 72-1399

UNITED STATES OF AMERICA, APPELLANT

v.

DOMINIC NICHOLAS GIORDANO, ETC., APPELLEE

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No. 72-1407

UNITED STATES OF AMERICA, APPELLANT

v.

DOMINIC NICHOLAS GIORDANO, ETC., ET AL., APPELLEES

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### ORDER

Upon consideration of the petition for a rehearing filed on behalf of the United States,

Now, therefore, with the concurrence and approval of Judge Sobeloff and Judge Winter,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

JOHN D. BUTZNER, Jr.,  
*United States Circuit Judge.*

Filed December 27, 1972.

WILLIAM K. SLATE,  
*Clerk.*

## APPENDIX C

In the United States District Court for the District  
of Maryland

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Criminal No. 70-0483-M

UNITED STATES OF AMERICA

v.

MICHAEL FOCARILE, ET AL.

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Criminal No. 70-0486-M

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO, ET AL.

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Criminal No. 70-0487-M

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO, ET. AL.

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### ORDER

Upon the written supplemental motions to suppress evidence, filed on behalf of defendants, Giordano, Davis, Wallace, Blackwell, Pettiford, and Harris, and the oral supplemental motion to suppress evidence, made on behalf of defendant Williams, in the above entitled cases, and after consideration of said motions

and the respective arguments of counsel, for the reasons stated in an opinion to follow hereafter, it is this 15th day of February, 1972, by the United States District Court for the District of Maryland,

ORDERED that the aforesaid motions of defendants, Giordano, Davis, Wallace, Blackwell, Pettiford, Harris, and Williams, be, and the same are hereby, granted and that the contents of any intercepted telephone communications conducted on the telephone of Dominic Nicholas Giordano from the period October 16, 1970, to November 18, 1970, and all the evidence, if any, derived from the contents of said intercepted telephone communications be, and the same are hereby, suppressed and declared to be inadmissible as evidence at trial in any of the above entitled cases as to these defendants.

(S) JAMES R. MILLER, Jr.,  
*United States District Judge.*

## APPENDIX D

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In the United States District Court for the  
District of Maryland

Criminal No. 70-0483-M

UNITED STATES OF AMERICA

v.

MICHAEL FOCARILE, DOMINIC NICHOLAS GIORDANO,  
JOHN CHARLES D'ANNA, JAMES ALBERT WALLACE,  
HERMAN LEE PETTIFORD, RONALD E. BLACKWELL,  
MARGARET HARRIS, ROLAND JAMES POPE, STANLEY  
SILVERSTEIN, SAMPSON WILLIAMS, DANIEL L. DORSEY,  
ROY LEE DAVIS, JACK BALDWIN, RONALD JONES

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Criminal No. 70-0486-M

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO

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Criminal No. 70-0487-M

UNITED STATES OF AMERICA

v.

DOMINIC NICHOLAS GIORDANO AND MICHAEL FOCARILE

Filed: February 22, 1972.

George Beall, United States Attorney, and Francis S. Brocato, Assistant United States Attorney, both of Baltimore, Maryland, for plaintiff.

Aaron R. Schacher, Brooklyn, New York, for defendant Focarile. H. Russell Smouse, Baltimore, Maryland, for defendant Giordano. Frank V. Seglin-ski, Baltimore, Maryland, for defendant D'Anna. Howard L. Cardin, Baltimore, Maryland, for defendants Wallace, Baldwin, and Silverstein.

Arthur G. Murphy, Sr., Baltimore, Maryland, for defendants Pettiford and Harris. Jerome Blum, Baltimore, Maryland, for defendant Blackwell. John A. Shorter, Jr., Washington, D.C., for defendant Williams. Stephen H. Sachs, Baltimore, Maryland, for defendant Pope. Donald Daneman, Baltimore, Maryland, for defendant Dorsey.

Alan H. Murrell and Phillip M. Sutley, both of Baltimore, Maryland, for defendant Davis. Leonard S. Freedman and Stanley J. Shapiro, both of Baltimore, Maryland, for defendant Jones.

MILLER, *District Judge*:

#### OPINION

Motions to suppress the contents of intercepted telephone communications and evidence derived therefrom have been filed in three related cases. The telephone involved in all the motions was located in the apartment of Dominic Nicholas Giordano in Baltimore. For the purpose of ruling on the motions to suppress, the three cases shall be treated as one.

The wiretap involved was conducted by agents of the Bureau of Narcotics and Dangerous Drugs (BNDD), pursuant to an order issued on October 16, 1970, and an extension order issued on November 6, 1970, both by Chief Judge Northrop of this court

(Misc. No. 739-N). On October 8, 1970, Chief Judge Northrop had signed an order (Misc. No. 737-N) authorizing agents of the BNDD to utilize a device euphemistically known as a "pen register" to record the telephone numbers called from a telephone subscribed by a person subsequently identified as Dominic Nicholas Giordano. The pen register order was also extended by subsequent orders of Chief Judge Northrop, dated October 22, 1970, and November 6, 1970.

The motions raise serious questions relating to the constitutionality, scope, and meaning of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 112-223; 18 U.S.C. §§ 2510-2520. Due primarily to a lack of precedent in this circuit on most of the points raised in the motions, the court attempted to act cautiously in guiding the hearings which were conducted at great length. Both the defendants and the government were allowed great latitude in their attempts to sustain their respective factual and legal positions. As will become apparent from this opinion, this court believes that future hearings on motions to suppress filed in other wiretap cases can be substantially shortened and should be conducted generally in the same manner as hearings on search warrants and similar questions.

In the course of this opinion the points raised by the motions will be discussed. The factual background necessary for the resolution of the respective issues presented will be set forth in the respective sections of this opinion pertaining to the pertinent issue.

#### I. THE CONSTITUTIONALITY OF TITLE III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., is an

attempt by Congress to “\* \* \* prohibit[s] all wire-tapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order \* \* \*” and by certain other strictly limited classes of persons. 1968 U.S. Code Congr. & Adm. News, p. 2113. In the legislation Congress reaffirmed the Fourth Amendment requirement of prior judicial authorization for electronic surveillance and attempted to comply with the standards enunciated in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). *Ibid.* The defendants contend that the statute violates the prohibitions of the Fourth Amendment against unreasonable search and seizure.

It is elementary constitutional law that the Fourth Amendment does not prohibit all searches and seizures but only those that are unreasonable. *Carroll v. United States*, 267 U.S. 132, 147 (1925). Historically, the amendment was conceived with the idea of protecting the individual against the “general warrant” and safeguarding his privacy and security against arbitrary invasions by governmental officials. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The determination of the constitutionality of Title III—and particularly 18 U.S.C. § 2518—therefore rests on the question whether it “is so broad as to result in the authorization of a general warrant permitting an unreasonable search and seizure in derogation of the 4th Amendment.” *United States v. Scott*, 331 F. Supp. 233 (D.D.C. 1971).

The standards for testing the constitutionality of a statute authorizing electronic surveillance have been promulgated by the United States Supreme Court in *Berger v. New York*, *supra*; *Katz v. United States*, *supra*; and *Osborn v. United States*, 385 U.S. 323



(1966). Although the Supreme Court has not as yet ruled specifically on the constitutionality of Title III, this issue has been raised before other federal tribunals. Thus far, Title III has successfully run the constitutional gauntlet imposed by *Berger*, *Katz*, and *Osborn*. *United States v. Cox*, 449 F. 2d 679 (10th Cir. 1971); *United States v. King*, — F. Supp. —, 40 L.W. 2344 (S.D. Cal. Nov. 23, 1971); *United States v. Perillo*, 333 F. Supp. 914 (D. Del. 1971); *United States v. Leta*, 332 F. Supp. 1357 (M.D. Pa. 1971); *United States v. Scott*, *supra*; *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1971); *United States v. Sklaroff*, 323 F. Supp. 296 (S.D. Fla. 1971); *United States v. Escander*, 319 F. Supp. 295 (S.D. Fla. 1970), reversed on other grounds *sub nom. United States v. Robinson*, — F. 2d —, 40 L.W. 2454 (5th Cir., Jan. 12, 1972).

Judge Nielsen in *United States v. King*, *supra*, at p. 6, correctly and succinctly characterized the strict limitations upon electronic searches imposed by Title III when he said:

“\* \* \* It is not in dispute that general, exploratory electronic searches are not permissible under the Fourth Amendment, but Section 2518 appears to have been drawn with the specific purpose of eliminating such a possibility in the narrowly circumscribed system it creates. Under Section 2518 a wiretap may be effected only when a federal judge determines there is probable cause to believe a specific offense has been, is being, or will be committed, and that telephonic communications will reveal pertinent information. There are other precautionary measures; among the most important: the communications to be intercepted must be specifically described; normal investigative procedures must be shown to be inadequate or inappropriate; the duration of the wiretap must be strictly limited; efforts must be made to mini-



mize the interceptions which do not relate to the subject matter of the investigation and frequent progress reports must be made to the authorizing judge. \* \* \*

This court concurs with the other courts cited above which have found that Title III, and particularly section 2518, complies with the constitutional requirements of the Fourth Amendment. The reasons for this conclusion are set forth at length in these cases.

## II. THE PEN REGISTER

The order of Chief Judge Northrop of October 8, 1970, in Misc. No. 737-N, authorized BNDD agents to "attach a device which will register the telephone numbers called from the telephone subscribed to by Nicholas Giordina and carrying number 685-0211." The authorization was to terminate fourteen (14) days from the date of the order and progress reports were to be made to the court on the 5th and 10th days following the order. On October 22, 1970, and on November 6, 1970, extensions were granted for the continued use of a telephone registering device on the telephone subscribed to by Dominic Nicholas Giordano (it had been learned by BNDD in the interim that the subscriber's real name was "Giordano" and not "Giordina") and carrying the new number 685-2332. Termination dates and dates for progress reports were also established for these extensions.

Defendants have attacked these orders for the use of a pen register<sup>1</sup> device on two fronts: (1) the require-

<sup>1</sup> The following definition of a "pen register" is found in *United States v. Caplan*, 255 F. Supp. 805, 807 (E.D. Mich. 1966):

"The pen register is a device attached to a given telephone line usually at a central telephone office. A pulsation of the

ments for the interception of oral and wire communications as set forth in Title III were not met and (2) there was no sufficient showing of probable cause to warrant the judge granting the "pen register" order.

The determination of the validity of the first contention of the defendants requires the court to make the threshold determination as to whether the recording of numbers with a pen register or similar device is an "interception" within the meaning of 18 U.S.C. § 2510(4), thus making compliance with the procedures set forth in §§ 2516 and 2518 a prerequisite to the installation and use of such devices. Although there are a number of cases<sup>2</sup> which have held that the use of a pen register to record calls is an interception of a communication within the meaning of the Communications Act of 1934 (47 U.S.C. § 605), the predecessor to Title III, this court is of the opinion that the use of a pen register or similar device is not an "interception" within the meaning of section 2510(4) of Title III therefore making compliance with Title III unnecessary. *Accord United States v. King, supra; United States v. Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971); *United States v. Escander, supra*, reversed on

dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent and completed record of outgoing numbers called on the particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation."

<sup>2</sup> *United States v. Dote*, 371 F. 2d 176 (7th Cir. 1966); *United States v. Caplan, supra*; cf. *United States v. Covello*: 410 F. 2d 536 (2d Cir. 1969).

other grounds *sub nom. United States v. Robinson, supra.*

The term "intercept" is defined under 18 U.S.C. § 2510(4) as "the *aural* acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device." (emphasis added). Webster's Third New International Dictionary has defined the word "aural," *inter alia*, as "of or relating to the sense of hearing." The evidence in this case clearly indicates that not only did Congress intend that pen register devices be excluded from the requirements of Title III, but also that pen register devices when used as decoders only do not involve the "aural acquisition of the contents of any wire or oral communication."

The legislative history of Title III discloses unequivocally that Congress did not contemplate that the use of pen register devices would fall within the ambit of the Act. The Senate Committee on the Judiciary's Report on The Omnibus Crime Control and Safe Streets Act of 1968, S. Rep. No. 1097, 90th Cong. 2d Sess. (1968), explicitly states that a pen register is not an interception under Title III:

Paragraph (4) defines "intercept" to include the aural acquisition of the contents of any wire or oral communication by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. See *Lee v. United States*, 274 U.S. 559 (1927); *Corngold v. United States*, 367 F. 2d (9th 1966). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an "interception." (*United States v. Russo*, 250 F. Supp. 55 (E.D. Pa. 1966)). The proposed legislation is not designed to prevent the tracing of phone calls.

*The use of a "pen register," for example, would be permissible. But see United States v. Dote, 371 F. 2d 176 (7th 1966). The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication. (Emphasis added). 1968 U.S. Code Congr. & Adm. News, p. 2178.*

However, even if this clear congressional intent were not demonstrated, the testimony as to the operation of the type of pen register device utilized in this case by the expert witness, Girvan N. Snider, clearly shows that the device as used here did not make "aural acquisitions" within the meaning of § 2510(4).

The telephone which was in Giordano's apartment was a rotary dial type rather than a touch tone type (Tr. 3:355; 6:1030). The pen register device used in this case is known as a TR-12 touch tone decoder with a dial add-on" (Tr. 3:356; 6:1023-1024). The TR-12 touch tone decoder is the modern device used as a pen register for touch tone phones whereas the same device with a "dial add-on" is used for dial phones (Tr. 6:1024).

In the case of a rotary dial phone, when a digit is dialed, a switch is opened and closed a corresponding number of times to the digit dialed which in turn interrupts the direct current on the line and causes the voltage of the electrical current to rise or fall the corresponding number of times (Tr. 6:1027). The TR-12 touch tone decoder with dial add-on, through its circuitry counts the number of pulses in the electrical energy caused by the changes in voltage, and causes the digit dialed on the telephone to be printed in arabic numerals corresponding to the number of electric pulses (Tr. 6:1027-1031). The only difference in function between an old style pen register, used for a rotary dial phone, and a TR-12 touch tone

record with a dial add-on is that the former printed out a number of dots corresponding in number to the digit dialed while the latter actually prints out the arabic numeral (Tr. 6:1038-1039).

In the case of a touch tone telephone, the press of a button on the face of the phone activates an electrical oscillation which generates two alternating electrical currents at frequencies assigned by the telephone company to correspond to the particular button pushed. The TR-12 touch tone decoder detects these electrical currents at the varying frequencies and determines the arabic number to which the various combinations of frequencies of electrical current have previously been assigned by the telephone company. The TR-12 then prints out that arabic number (TR 6:1040-1048). The old style pen register will not work on a touch tone phone (Tr. 6:1039).

In both the rotary dial phone and the touch tone phone, when the receiver is taken off the hook, a drop in electrical voltage occurs on the telephone lines which can be detected by a volunteer (Tr. 6:1040).

The TR-12 decoder, with or without the dial add-on, does not hear sound (Tr. 6:1045). It merely detects changes in electrical currents, voltages, and frequencies. The TR-12, however, does have some connection with aural frequencies in that electrical impulses can be converted to aural vibrations through a transducer such as a headphone or loudspeaker. (Tr. 3:351). The TR-12, when used as a decoder only, is not equipped with a transducer and does not convert the electrical impulses into aural ones even though some of the electrical impulses might be in the aural range. (Tr. 6:1056-1061). There is no evidence that at any time during the use of the TR-12 touch tone decoder on the Giordano telephone that a transducer

was used as a part of the pen register function. There is no evidence that the TR-12 was used for any purpose other than to record the numbers of telephones to which outgoing calls were made on the Giordano phone and to record the fact the Giordano phone was in use. Both of these uses of the TR-12 involved the measurement of electrical impulses, frequencies and voltages and not the interception or use of aural impulses.

Since the TR-12 touch tone decoder, either with or without the dial add-on, does not involve the interception, acquisition, or use of aural impulses, it is not the instrument by which an aural interception takes place within the meaning of § 2510(4), provided, of course, that transducers are not used to convert the electrical impulses to sound impulses. For this reason, the requirements of Title III do not apply to the installation of a TR-12 touch tone decoder so long as it is not used with a transducer to convert the electrical impulses to sound impulses either contemporaneously with the receipt of the electrical impulse or subsequently.

Although adherence to the requirements of Title III is not required for the installation of a pen register device, it is nevertheless possible that the Fourth Amendment would prohibit as an unreasonable search the installation of such a device on a telephone line without the issuance of a warrant upon probable cause. See *Dote* and *Caplan*, *supra*. In any event, in the present case the government filed its application for the installation of a pen register as an application in the nature of a request for a search warrant under the provisions of Rule 41 F.R.Crim.P. The original application of October 8, 1970, and the subsequent applications of October 22 and November 6, 1970, have



been attacked on the ground that there was no sufficient showing of probable cause.

The order of October 8, 1970 (Misc. 737-N) states that there is probable cause to believe that Nicholas Giordina of Baltimore, Maryland "is committing, and is about to commit, and is conspiring with other persons to commit, offenses involving the sale of narcotic drugs," that there is probable cause to believe that the telephone subscribed to by Nicholas Giordina and carrying number 685-0211 is being used in connection with the commission of the above mentioned offenses, and that there is further probable cause to believe that "telephone numbers presently being called from the telephone subscribed to by Nicholas Giordina \* \* \* are being called by Nicholas Giordina and that these calls relate to narcotics transactions."

The affidavit of BNDD agent Wayne A. Ambrose, Jr., which accompanied the application for the October 8, 1970 order, sets forth the following facts to establish the government's position that sufficient probable cause existed to justify the installation of a pen register device. Ambrose stated that a confidential informant told him that Nicholas Giordina, alias "Nick," had given the informant telephone number 685-0211 and had told the informant to call that telephone number when he wished to "transact narcotic business." On October 2, 1970, the informant made a call, which the affiant monitored with the informant's permission, to telephone number 685-0211 and negotiated for a sale of heroin with "Nick." The affiant monitored a second call to telephone number 685-0211 from the informant to "Giordina" on October 5, 1970. "Giordina" stated during the conversation that he was ready to do business at 7 p.m. A purchase was made from "Giordina" at 7:30 that evening of 110 grams of heroin (39% pure) by Special Agent Glen C.

Brown of the BNDD in the presence of the informant. In addition to the above information, the affiant stated that records of toll calls for telephone number 685-0211 had been subpoenaed from the telephone company. These records (which were attached to the affidavit) revealed, according to the affidavit, that several toll calls had been made from this telephone to the residence of two named Washington area narcotics violators well known to the BNDD.

Within the four corners of the affidavit, this court believes that there is sufficient reliable information to support Chief Judge Northrop's finding that probable cause existed and that the installation of a pen register was justified. Even though an informant's tip was part of the basis for believing probable cause to exist for the issuance of the warrant, it does not necessarily follow that the validity of the warrant depends upon the reliability of the informant and on the tests of *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aquilar v. Texas*, 378 U.S. 108 (1964). Here the bulk of the evidence establishing the use of the phone by "Giordina" for narcotic business was not dependent upon the hearsay information of the informant, but was instead based on the personal observations of Agent Ambrose himself. The Agent had monitored two narcotics oriented telephone calls to "Giordina" at number 685-0211 which resulted in the sale of heroin to Special Agent Brown. Moreover, he had knowledge of toll calls made from number 685-0211 to the residence of certain Washington narcotics violators. These facts alone would generate sufficient probable cause for the issuance of the order. But even assuming that the reliability of the informant had to be established, this court is of the opinion that the informant's credibility was established through the actions of BNDD Agents Ambrose and



Brown which are recited in the affidavit and which corroborated in every detail the informant's statement. This made it apparent that the informant had gained his information in a reliable way. Cf. *Draper v. United States*, 358 U.S. 307 (1959); *Spinelli v. United States*, *supra*, at pp. 416-17.

The subsequent extension orders are not supported by sufficient showings of probable cause, however, for the reason that information was used to obtain those extension orders from a Title III wiretap which, for reasons appearing later in this opinion, was defective. The "fruit of the poisonous tree" doctrine requires the suppression of all pen register information obtained under the subsequent orders. *Nardone v. United States*, 308 U.S. 338 (1939); 18 U.S.C. § 2518(10)(a).

### III. EXHAUSTION OF INVESTIGATIVE TECHNIQUES

Defendants contend that other methods of investigation could and should have been used to determine the scope of the alleged narcotics conspiracy in lieu of the wiretap. Their objection to the use of the wiretap is based on 18 U.S.C. § 2518(3)(C) which provides, as a condition precedent to judicial approval of a Title III intercept, that the government establish that "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Many pages of the transcript of the suppression hearings are occupied with testimony on this subject. After reviewing the applications for the intercept and for the extension orders, as well as after review of the testimony at the hearings on these motions, the court finds that this arrow from the collective bow of the defendants falls short of its mark.

The paramount objective of the investigation which centered around defendant Giordano was to uncover

the nature, structure, and scope of the narcotics distribution network of which he was thought to be a key figure. It is important to note that the investigation was not directed at disclosing merely the culpability of Giordano. In fact, the affidavit accompanying the application (as well as the testimony at the hearings) clearly indicated that the government already had a substantial case against Giordano prior to the application for the Title III intercept. The reason for the wiretap then was to determine (1) the time, place, and manner of delivery of narcotics to "Giordina" by his suppliers as well as information on the payments by "Giordina" to his suppliers, (2) the time, place, and manner of delivery of narcotics by "Giordina" to his buyers and information relating to the payments to "Giordina" by his buyers (See Application, Misc. No. 739-N, p. 2-3). This information sought to "reveal the details of the scheme which has been used by Nicholas Giordina and others as yet unknown to receive, conceal, buy, and sell illegal narcotic drugs, and the identity of his confederates, their places of operation, and the nature of the conspiracy involved therein \* \* \* " *Ibid.* at p. 4. The efforts of the government to exhaust other normal investigative techniques must be considered in light of that purpose.

Defendants have advanced numerous examples of investigative techniques that they contend could have been used against Giordano but were not employed. They allege that the government did not sufficiently check with agencies such as the FBI, the Internal Revenue Service, the Social Security Administration, and the Maryland State, New York City, and Baltimore City Police to establish the true identity of Giordano and to identify contacts of associates of his before resorting to the wiretap. It is also con-

tended that if the government had thoroughly inquired further at places that Giordano frequented such as Bickford's Restaurant, the Al-Ho Tavern, Robinson's Athletic Club, and his former place of employment, Goldbloom's Men's Store, that enough information could have been gathered to make the wiretap unnecessary. Moreover, it has been asserted that investigative techniques, such as surveillance and the questioning of known associates of Giordano, were not used to their fullest potential.

Had the sole purpose of the investigation been to disclose only Giordano's culpability in the narcotics trade, these arguments would be very persuasive. However, the investigation was not so limited. Moreover, the averments in the affidavit of Special Agent Ambrose, which accompanied the application, clearly indicated that a myriad of techniques had been tried and failed and had small potential for success in the future. Particularly significant were the following averments by Ambrose.

A. Criminal records checks on Giordina with the Maryland State Police, Baltimore City Police Department, Baltimore County Police Department, Baltimore Regional Office, and New York City Police Department have met with negative results.

\* \* \* \*

E. Giordina lives in Apartment 1304, 8 Charles Plaza, Baltimore, Maryland. This building is a high-rise apartment house located between Charles and Liberty Streets, and Saratoga and Baltimore Streets, Baltimore, Maryland. Eight Charles Plaza is located in a complex, and the buildings known as Charles Plaza consist of stores, shops, theaters, and other establishments. There are two main entrances to 8 Charles Plaza which remain locked at all

times, and under security guard, with a television monitoring system. There are other means of egress from and ingress to the apartment complex through underground garages. The nature of this arrangement makes effective surveillance of Giordina almost impossible. Full scale surveillance by BNDD has been attempted from October 5 to date. It has met with very limited success. Effective surveillance would be impossible without the knowledge and active aid of apartment security guards and they could not be informed of BNDD surveillance without compromising the investigation. The "pen register" documents a number of calls from 685-0211 to the apartment security desk.

\* \* \* \* \*

G. Only one informant, SE-1, has been developed who has had dealings with Giordina. SE-1 is not a confidant of Giordina and SE-1 only purchases narcotics from him. It is not possible for SE-1 to attempt to infiltrate Giordina's organization without arousing suspicion.

H. Other individuals both referred to in this affidavit and not referred to herein, who are connected with Giordina, cannot be approached to give information with regard to Giordina without the danger of them informing him of the pendency of a BNDD investigation.

\* \* \* \* \*

J. The "pen register" has shown so far that Giordina receives numerous incoming calls. Without a wire intercept, it would be nearly impossible to identify the individuals making these incoming calls, from whom these narcotics are coming, how, where, when and by what method they are locally distributed.

\* \* \* \* \*

L. Unless electronic surveillance were instituted for number (301) 585-0211, further investigation of Giordina could not progress. He

could be arrested, but knowledge of his source of supply and method of distribution would be almost totally lacking.

Likewise, the affidavit of BNDD Agent Azzam, which accompanied the application for the Title III extension order, clearly showed that the use of conventional investigative techniques still had proved fruitless as of November 6, 1970, when the extension application was made. In that affidavit, Agent Azzam stated that because Giordano (who by that time had been correctly identified) would deal only with people he trusted, infiltration of the group of Giordano's associates remained impossible. He also stated that Giordano's wariness of strangers, his extreme caution, and his use of various counter-surveillance techniques made conventional surveillance completely ineffective. During this time, as well, Giordano changed his telephone number.

The issuing judge, based on the affidavits submitted to him as appear in the record in Misc. No. 739-N, had in this court's opinion ample justification under the circumstances to make the finding required by § 2518(3)(c), both as to the original order and the extension. Cf. *United States v. Leta, supra*, at 1362-63.

Generally, where an affidavit is the only matter presented to the issuing judge the warrant must stand or fall on the contents of the affidavit alone and what is adduced at a subsequent hearing on a motion to suppress cannot be used by the trial court to augment an otherwise defective affidavit. *United States v. Melvin*, 419 F. 2d 136, 140 (4th Cir. 1969); *United States v. Roth*, 391 F. 2d 507, 509 (7th Cir. 1967). But if a subsequent hearing discloses gross errors in the assertions of an affidavit, these must be considered by the trial judge in determining whether the requirements

for the issuance of the warrant were satisfied. *United States v. Roth*, *supra*, at 509; *King v. United States*, 282 F. 2d 398 (4th Cir. 1960). After reviewing the testimony taken at the suppression hearing, I am satisfied that the averments of the affidavit were neither discredited nor impeached. At most, the advantages of hindsight were proved at the suppression hearings once again to be much more certain than those of foresight. The BNDD agents are not required, however, to prove to a certainty that normal techniques of investigation will not succeed. They need only show that they "reasonably appear unlikely to succeed if tried." Section 2518(3)(c). This the BNDD agents did at the time of the respective applications to the court.

#### IV. MINIMIZATION

To prevent improper invasion of the right of privacy provided by the Fourth Amendment and to curtail the indiscriminate seizure of communications, Congress incorporated into Title III certain safeguards. Among these measures was the provision contained in 18 U.S.C. § 2518(5) which provides in pertinent part that:

Every order \* \* \* shall contain a provision that the authorization to intercept \* \* \* shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception \* \* \*.

Unfortunately there are no statutory guidelines elucidating how minimization is to be effected. The cases interpreting this minimization provision are not entirely clear, nor consistent, nor abundant. This court is aware of only three decisions directly on the subject, *United States v. King*, — F. Supp. —, 40

L.W. 2344 (S.D. Cal. Nov. 23, 1971); *United States v. Leta, supra*; and *United States v. Scott, supra*.

In the *Scott* case, Judge Waddy relied heavily upon a statistical breakdown of the telephone calls intercepted in reaching his ultimate conclusion to suppress *all* telephone calls because of the government's failure to minimize its surveillance. Pursuant to a Title III court order to conduct a wiretap for the purpose of acquiring information pertaining to narcotics violations, the government in that case intercepted and recorded virtually all conversations in spite of the order's unequivocal mandate to minimize. Approximately 60% of the calls intercepted were completely unrelated to narcotics. Although Judge Waddy found neither of these facts standing alone to be conclusive, he stated that "\* \* \* together they strongly indicate the indiscriminate use of wire surveillance that was proscribed by *Katz* and *Berger*." 331 F. Supp. at 247. Moreover, Judge Waddy gave particular significance to the fact that the surveillants did not even attempt "lip service compliance" with the provisions of the order and the statutory mandate but instead completely disregarded it. *Ibid*. In concluding that *all* calls should be suppressed because of the government's complete failure to minimize, Judge Waddy stated:

If this Court were to allow all the Government agents to indiscriminately intercept every conversation made and to continue monitoring such calls when it became clear that they are not related to the "authorized objectives" of the wiretap and in violation of the limiting provisions of the order, such order would become meaningless verbiage and the protection to the right of privacy outlined in *Berger* and *Katz* would be illusory. *Ibid* at 248.

Although giving some weight to the statistical analysis of intercepted conversations, Judge Nielsen in



the *King* case relied more heavily on other grounds in reaching the conclusion that failure to minimize warranted only *partial*, not complete, suppression of intercepted communications. As in *Scott*, the government agents, pursuant to a Title III court order to conduct a telephone surveillance to obtain information of narcotics violations, maintained a wiretap on defendant King's telephone for a total of 45 days, 24 hours a day. Contrary to *Scott*, Judge Nielsen rejected the premise that "\* \* \* the great delicacy which inheres in a wiretap situation sets it so far apart from other types of searches and seizures that error as to conduct of a part of the surveillance renders the entire interception invalid." 40 L.W. at 2344. Rather, he based his decision on the framework of the general law of search and seizure.

Judge Nielsen was careful to distinguish the wiretap in *King* from other situations where some violation of Fourth Amendment rights tainted the entire search and seizure, compelling complete suppression. In *Berger* and *Katz*, the two most significant decisions in the area of electronic surveillance, he reasoned that there was total suppression because both surveillances were void *ab initio*, in the latter case because of a lack of court authorization and in the former because the statute under which the wiretap was conducted was unconstitutional. In contrast to these cases, Judge Nielsen in *King* observed that the defect in the wiretap in his case lay in the carrying out of the court order by the law enforcement officers and not in the statute or order themselves. Relying on *Marron v. United States*, 275 U.S. 192 (1927) and Rule 41(e) F.R.Crim.P., Judge Nielsen determined that an item-by-item consideration of the warrant and the items seized pursuant thereto was required. But more significantly, he stated that in the ordinary case,



the seizure of some items of evidence in excess of those specified in a search warrant does not result in the suppression of those items which were validly seized. From this principle he concluded that he would entertain objections to the introduction of a particular item into evidence at trial on the ground "that the interception by which it was obtained was beyond the scope of the authorizing order." 40 L.W. at 2344. Judge Nielsen ended his discussion of minimization with the following admonition:

That this Court has declined to suppress the entire wire interception should in no way be taken as judicial approval of the Government's tactics. By failing to minimize surveillance in accordance with the statute and the authorizing order, the Government has placed upon this Court the burden of effecting minimization, a situation hardly envisioned by the statute, and one which this Court does not willingly accept. The Government would do well to remember that the limited system which the statute creates is designed to prevent unreasonable invasions of privacy, not to repair them, and that if those limitations are not voluntarily adhered to by the Government, total suppression may well prove to be the only feasible solution. *Supra*, pp. 35-36.

Although Judge Muir's opinion in *United States v. Leta*, *supra*, does not speak directly to the question of whether efforts were made to minimize in that case, it nevertheless does contain incisive insights into the concept of minimization. *Leta* begins with the premise that "the seizure of items which have not been particularly described does not *per se* vitiate an entire search; the entire search is vitiated only if unreasonable." 322 F. Supp. at 1360. Moreover, unlike *King* and *Scott*, *Leta* appears to say that with regard to

wiretaps, reasonableness is determined by the standards set forth in Title III. Thus, if a wiretap does not comport with the mandates of Title III, it becomes *prima facie* unreasonable. The language in footnote 4 on p. 1360 of *Leta* seems to confirm this interpretation:

There may be some situations in which it will be necessary to record 100% of the conversations over a particular phone. This necessity, by itself, would not make the seizure unreasonable. However, it may also be that 100% recording will take place without an effort to minimize where possible. In such a situation, 18 U.S.C. § 2518(5) will have been violated and it would appear that under 18 U.S.C. § 2518(10), as well as the Fourth Amendment, all the seized conversations would have to be excluded from use by the government.

The meaning of the words of the statute relating to minimization is best found, this court believes, in the language itself. What is required is the minimization of “\* \* \* the interception of communications not otherwise subject to interception under this chapter \* \* \*” Section 2518(5). It does not say that *no* such communication can be intercepted, but only that the interception of such communications should be minimized. The verb “minimize” is defined in Webster’s New Third International Dictionary as meaning:

to reduce to the smallest possible number, degree or extent.

The communications which are not subject to interception under Title III are those which, under the provisions of §§ 2516(1)(a) through 2516(1)(f), do not provide evidence of the commission of certain

enumerated crimes or of a conspiracy to commit the same.

Therefore, the minimization requirement of § 2518 (5) means that the intercept procedure shall be conducted in such a way as to reduce to the smallest possible number the interception of communications which do not provide evidence relating to the commission of any of the crimes set forth in §§ 2516(1)(a)-2516(1)(f).

*Scott, King and Leta*, as well as a common sense approach to the problem lead one to the conclusion that there can be essentially two different types of violation of the minimization requirement of § 2518 (5). The first type of violation would be the one committed if there had been no attempt at all to minimize the interception of "innocent" calls. This first type of violation would obviously be a blatant violation of the provisions of Title III and, in addition, would probably violate the precepts of the Fourth Amendment.<sup>3</sup> The second type of violation of the minimization requirement would be the one committed if there is an inadequate method or effort to minimize. The violation, if any, that occurred here would have to be of

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<sup>3</sup> It is possible that the Fourth Amendment would not condemn a series of interceptions of calls made to or from a known conspirator, even though many of those calls turned out to be "innocent" calls, provided that all the other requirements of the type imposed by Title III were met. Mr. Justice Stewart in *Katz v. United States*, *supra*, at 354, indicated that it was of great significance in that case that only the calls of the putative defendant were monitored and that the government agents conducted their surveillance only when he was using the telephone booth to which the wiretap was connected. Whether this means that the Fourth Amendment requires a lesser degree of minimization than Title III is a question which it is not necessary here to decide. Cf. *United States v. Scott*, *supra*, at 247.

the second type under the facts developed at the hearings on the motions to suppress. The standard to be applied to determine whether or not a violation of the second type has occurred will be discussed at length later.

In either type of violation of the minimization requirement, a question necessarily arises as to the extent of the prophylactic remedies necessary to give the requirement meaning. In this court's opinion the minimization requirement of § 2518(5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial *after* the interception is a *fait accompli*. Minimization as required by the statute must be employed by the law enforcement officers *during* the wiretap, not by the court *after* the wiretap. Although Judge Nielsen approved an item-by-item wiretap approach in *United States v. King*, *supra*, he himself provided a strong argument against such an approach when he said in *King*, "\* \* \* the limited system which the statute creates is designed to *prevent* unreasonable invasions of privacy, not to *repair* them. \* \* \*" (Emphasis added). *Supra*, pp. 35-36. While partial suppression under Rule 41(c) F.R. Crim. P. may act as a sufficient prophylactic measure in the context of seizures of physical objects, the seizure of conversations differs so significantly as to warrant a stronger safeguard. Knowing that only "innocent calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III. A conversation once seized can never truly be given back as can a

physical object. The right of privacy protected by the Fourth Amendment has been more invaded where a conversation which can never be returned has been seized than where a physical object which can be returned has been seized. There is more reason, therefore, to require a more strict rule than the partial suggestion remedy advanced by Judge Nielsen in *King, supra*. For these reasons, this court rules that a failure by the government to comply with the § 2518(5) minimization requirement would require total suppression of all of the communications intercepted.

Since total suppression is the remedy, the question remains whether the government in this case did violate the minimization requirement by adopting an inadequate method or effort to accomplish minimization. What, then, is the standard by which the government methods or efforts must be measured?

Section 2518(5), as has been seen, requires the intercept procedure to be conducted so as to reduce to the smallest possible number the interception of "innocent" calls. In this context the word "possible" means "feasible" or "practicable" while still allowing the legitimate law enforcement aims of the statute to be accomplished. This is but another way of saying that the methods and efforts utilized in minimization must be reasonable, the traditional and acceptable standard of measuring the validity of a search under the Fourth Amendment, *Berger v. New York, supra*, at 53, and must allow " \* \* \* no greater invasion of privacy \* \* \* than [is] necessary under the circumstances." *Osborn v. United States, supra*, at 57; *Katz v. United States, supra*, at 355.

What is "reasonable," "practicable," or "feasible" depends upon the facts and circumstances in each case.

*Ibid.* It is certainly unreasonable and goes beyond the limits of practicability or feasibility in every case to give a seizing officer what the *Berger* court characterized as a "roving commission to 'seize' any and all conversations." 388 U.S. at 59. But it is not unreasonable to recognize that it is much easier to describe with particularity in a warrant the nature and contents of a physical object than a conversation which has not yet been heard. In the former case the law enforcement officer can by sight and touch generally determine before he takes the item into his custody whether it is something which he is authorized to seize by the warrant while in the latter case he can generally determine with exactness whether the conversation is authorized to be seized by the warrant only when he has already taken it into custody by having heard it in its entirety.

In the present case the primary purpose of the wiretap was not to accumulate evidence against Giordano, but rather to determine the scope of the alleged narcotics conspiracy and to determine its method of operation, all of which was unknown on October 16, 1970. (Tr. 12:2063). Thus all individuals whom Giordano called or who called him at that time were putative defendants. It had already been established through the calls by the confidential informant to Giordano with BNDD Agent Ambrose listening that Giordano used the telephone to some extent to arrange for sales of narcotics. But as the government has pointed out, this increased the minimization problem because upon the decision to cease monitoring certain individuals, those individuals could no longer be considered defendants since "selective" monitoring of their conversations with Giordano would destroy the evidence value as to them. Decisions on minimization

became more difficult in light of the substantial number of calls involving gambling which would appear to be subject to interception under §§ 2516(1)(e) and 2517(5). In addition Giordano had a number of calls to and from women, a circumstance which the BNDD agents did not know were "innocent" calls initially since it was their general experience that narcotics dealers frequently made wide use of their women in furthering their narcotics traffic. (E.g. Tr. 12:2060-68). Similarly, BNDD agents in their experience felt that, particularly in drug traffic, many seemingly innocuous calls in general contained information pertaining to the drug operation. (Tr. 12:2060).

The intercept went into effect on Giordano's phone on October 16, 1970, after the order was signed by Chief Judge Northrop. Agent Azzam, group supervisor of the BNDD and the agent in charge of the Giordano intercept under the general supervision of Mr. Brocato, testified that there were fourteen (14) agents from time to time who monitored the equipment. (Tr. 10:1720). Each agent who listened kept a log of (1) the footage of the recording tape, (2) the telephone number dialed, (3) the code number for each call, and (4) notes regarding the contents of each call. (Tr. 10:1716). From the inception of the intercept on October 16, 1971, until the initial classification of "innocent" calls was made, Agent Azzam stated that there was a constant dialogue both among the agents and with the Assistant United States Attorney, Mr. Brocato, regarding the provisions of the order and the issue of minimization. (Tr. 10:1725-32). Although Agent Azzam testified that he did not have knowledge of how to minimize the intercepts (Tr. 10:1728), he stated that Mr. Brocato determined that some form of minimization would have to be effected. (Tr. 10:1733).



He went on to state that on October 26, 1970, Mr. Brocato told him to prepare a synopsis of the calls thus far intercepted. (Tr. 10:1734). When he, his supervisors, and Mr. Brocato analyzed the list prepared, it was concluded that the pattern of certain of the outgoing and incoming calls were of a personal nature and apparently not related to illegal drug traffic. (Tr. 10:1734-35). As a result of this analysis, Mr. Brocato prepared a written list of *telephone numbers* that the agents were *not to listen to* when those telephone numbers were called. (Tr. 10:1735). Also instructions were given at this time to cut off the monitoring of any conversations with females who did not immediately begin talking about drugs or gambling. (Tr. 10:1746).

From the testimony it appears that the list of telephone numbers contained about ten (10) numbers. (Tr. 10:1738). Agent Azzam testified further that this plan for minimizing interceptions went into effect sometime between October 28 and 29, 1971. (Tr. 10:1754). At this time techniques were also developed to record the daily statistical nature of monitored calls. (Tr. 10:1740). This plan for minimization was instituted under the supervision of the authorizing judge, Chief Judge Northrop. The reports submitted to him on October 21, 1970 and on October 26, 1970 apprised him fully of the progress of wiretap. He was advised that "guarded conversations, using code words, involving narcotics" were being used, that all calls were being intercepted and that the percentage of narcotic related interceptions appeared low. The last paragraph of the report of October 26, 1970 by the Assistant United States Attorney summarized the status of the wiretap prior to minimization:

A total of 155 conversations have been intercepted during the period of this report. Ap-



proximately 13 conversations appear to be of an incriminatory nature. I am presently reviewing the logs and following the precepts of *Katz v. United States*. I will order that calls to numbers which apparently have not related to narcotics traffic will cease to be monitored. Misc. No. 739, Paper No. 5.

Although statistical breakdowns are by no means determinative of the issue of minimization, they do offer some insight on that issue. The statistics of the government show that 1613 calls were made to and from the Giordano telephone during the pendency of the Title III interception. Of that number, 983 calls involved situations, the government contends, where no conversation ensued (the line was busy, no one was home, etc.). Of the remaining 630 calls, 355 were monitored completely and 275 were categorized as "not monitored."<sup>4</sup> Of the monitored conversations, the government has alleged that 102 involved narcotics and 75 involved gambling (a total of 177). Thus, the government has asserted that approximately 50% of the total monitored conversations involved illegality and 30% involved narcotics. However, the statistics of the government appear to reflect the maximum percentage of calls that could be classified as "narcotics related." The defendants have argued that many of these government labeled "narcotics related" calls do not, in fact, have anything to do with narcotics. Also defendants have averred that many of the calls classified by the government as "not monitored" were

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<sup>4</sup> Calls classified as "not monitored," the government has stated, are those where no conversation was overheard, a small portion of the conversation was overheard until a prescribed voice or a prescribed telephone number (previously identified) had been ascertained or until the gist of the conversation was determined to be non-narcotics related.

monitored by the government in whole or in part and should be so designated in the statistics. Because the validity of the statistics and the designation and compilation of the calls contained in them are subject to divergent viewpoints, this court believes that these statistics must be viewed with some skepticism. The statistics do show, however, that a substantial effort was made to limit the number of interceptions. Taking the government figures at their best, 178 "innocent" calls were completely monitored out of a total 630 completed calls, which means that 72% of the completed calls were either not intercepted or were of an incriminating nature. While the exact figures may be in dispute, at least arguably the government attempted to minimize "innocent" interceptions. Also to be borne in mind is that the above statistics include all calls both before October 29, 1970, when admittedly the government was monitoring all calls, as well as after that date when Agent Azzam testified that the pattern had been sufficiently established in Giordano's calls to allow Mr. Brocato to prepare the instructions on persons, phone numbers, and types of calls which were to be excluded from interception.

While it is argued that the limiting instructions and procedures should have been instituted at a much earlier date, that is a question upon which reasonable men could differ. As Agent Azzam said in his testimony:

It seems to me that the order is quite clear that [the interception of] personal conversations \* \* \* [is] to be minimized, but before a conversation can be categorized as personal, it has to be listened to, and after a pattern is established, which is what happened here, certain specific persons and types of calls were made taboo for us to intercept.

As I have stated, some numbers were definitely not to be monitored, and then there was a general rule, specifically general rule of thumb, that any phone calls from females to Giordano would not be monitored. But that occurred after an analysis of many, many phone calls between him and several women. (Tr. 10:1807-08).

Although total interception for 12 to 13 days may well be unreasonable under ordinary circumstances to establish a pattern, it does not seem to the court unreasonable here where there was an alleged narcotics conspiracy involving an unknown number of persons and where it was extremely difficult, if not impossible, to determine which calls were "innocent" in advance of obtaining a reliable pattern.

For the above reasons this court finds that the allegation of the defendants that the government failed to minimize interceptions in accordance with § 2518(5) to be without merit.

#### V. ADDITIONAL ARGUMENTS OF DEFENDANTS

In addition to the points raised in the original motions to suppress which have previously been discussed in this opinion, defendants have challenged the Title III intercept in this case on the following grounds:

1. The applications for the initial Title III intercept and the extension did not establish probable cause;
2. The period of interception was unreasonably long; and
3. The applications and orders did not comply with the statutory requirements of § 2518 (1) and (4),<sup>5</sup>

<sup>5</sup> The question of authorization for the intercept will not be treated in this section but will be discussed in the final section of this opinion. See pp. 30-48 *infra*.

regarding certain information which must be set forth in the order and application for a Title III interception.

As to defendants' first contention, this court has concluded that it is wholly without merit.<sup>6</sup> In both the October 16, 1970 application and the extension application of November 6, 1970, there was ample evidence of probable cause to justify the issuance of orders for Title III intercepts. Since a detailed analysis of the evidence constituting the grounds for probable cause in these two applications would be more academic than enlightening, let it suffice to say that the pen register information, the toll record information coupled with the information regarding the activities of Giordano himself, including the sale by Giordano of 110 grams of heroin to Special Agent Brown, BNDD, all of which information is set forth in the affidavits accompanying the application, sufficiently establishes probable cause for the issuance of the October 16, 1970 intercept. The affidavits accompanying the November 6, 1970 extension application include facts of alleged narcotics dealings between Giordano and other of the defendants derived from the Title III intercept which had been in effect and also facts of another sale of heroin to Special Agent Brown by Giordano. Although there is other supporting information, these facts alone would generate enough probable cause to justify the issuance of the extension intercept order. Thus, all of defendants'

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<sup>6</sup> This section of this opinion does not consider the effect of the conclusions of Section VI thereof. Since the results of the interceptions conducted under the original Title III order must be suppressed for the reasons set forth in Section VI of this opinion, the probable cause for the extension order, based in part on those initial wiretap results, would necessarily be insufficient. 18 U.S.C. § 2518(10) (a).

arguments regarding the question of probable cause must fail.

Defendant's second contention, that the period of interception was unnecessarily long, can be dismissed summarily. Since both the initial intercept and the extension were each conducted for a period of time less than 30 days, the maximum period allowed by the statute for any one intercept, and since there is no evidence to support a finding that the intercepts in these cases lasted longer than necessary "to achieve the objective of the authorization,"<sup>7</sup> neither intercept was unnecessarily long. See *United States v. Leta*, *supra*, at 1360-61.

Likewise, defendants' final contention regarding the contents of the applications and orders can be dealt with in summary fashion. This court has reviewed all of the challenged orders and applications in this case regarding Title III intercepts and has found that, except for the requirements regarding authorization which will be discussed in Section VI, *infra*, all the information required under section 2518(1) with regard to applications and section 2518(4) with regard to orders was sufficiently set forth.

#### VI. AUTHORIZATION OF THE APPLICATIONS

Subsequent to the filing of, and hearings upon, the original motions to suppress in this case, *United States v. Robinson*, — F. 2d —, 40 L.W. 2454 (5th Cir., Jan. 12, 1972), holding the Title III wiretap in that case invalid, was decided. Revelations were made in that opinion that neither the Attorney General of the United States nor any Assistant Attorney General had personally authorized the application for the Title III wiretap involved in that proceeding.

<sup>7</sup> 18 U.S.C. § 2518(5).

Although it had previously been represented to this Court that Will Wilson, an Assistant Attorney General at the time of the filing of the wiretap application, had personally approved and authorized the same, the revelations of *Robinson* as to the procedure utilized in that case for the authorization of the application prompted a renewed inquiry by certain defense counsel as to the exact procedure of authorization followed in this case. When it became apparent that there was at least some uncertainty as to the authorization procedures followed prior to the filing of the application for the wiretap in this case, an order was issued requiring the government to set forth the relevant facts pertaining to the authorization procedures followed and granting the defendants leave to file supplemental motions to suppress if, in their judgment, the facts warranted such action.

The government filed the affidavit of Sol Lindenbaum, the Executive Assistant to the Attorney General of the United States, and the affidavit of Harold P. Shapiro, a Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice.

Mr. Lindenbaum's affidavit stated that the then Attorney General, the Honorable John N. Mitchell, had refrained from designating any Assistant Attorney General to authorize, without his approval, the filing of an application for a wiretap under 18 U.S.C. § 2516 (1) and that, instead, Attorney General Mitchell had required that all requests for such authorization be referred to him for consideration. Lindenbaum further stated that he had, in the normal course of his duties, reviewed such requests since February, 1969 and had made recommendations to the Attorney General thereon, in the course of which Mr. Lindenbaum became familiar with the statutory provisions relating

thereto and to the actions of the Attorney General thereon. Mr. Lindenbaum stated that on October 16, 1970, at a time when the Attorney General was on a trip away from Washington, D.C., a request for approval of an authorization to apply for a wiretap order in this case was forwarded to the Attorney General's office, together with a recommendation for approval from the Criminal Division of the Department of Justice. In the absence of the Attorney General, Mr. Lindenbaum, according to his affidavit, reviewed the application and its supporting documents and concluded, from his knowledge of the Attorney General's actions on previous cases, that Attorney General Mitchell would have approved the request if it had been submitted to him personally. Acting pursuant to a general authorization which had been given to him by the Attorney General to act in such circumstances, Mr. Lindenbaum approved the authorization request and placed the Attorney General's initials on a memorandum to Will Wilson, then Assistant Attorney General in charge of the Criminal Division of the Department of Justice, approving " \* \* \* a request that authorization be given to Francis S. Brocato to make application for an interception order." (See Lindenbaum's affidavit, p. 2). On November 6, 1970, the Attorney General personally approved a request that authorization be given to Mr. Brocato to make application for an order continuing the interception of the Giordano telephone in Baltimore and personally initialed a memorandum of that date to Will Wilson reflecting his favorable action on the request.

Mr. Shapiro's affidavit set forth details of the processing of the wiretap applications in this case within the Criminal Division of the Department of Justice prior to the forwarding of the respective applications to the Office of the Attorney General for approval of

the authorizations. They were each first reviewed by a staff attorney in a special unit of the Organized Crime and Racketeering Section of the Criminal Division for the purpose of " \* \* \* assuring strict adherence to the required statutory, judicial and constitutional standards." (See Shapiro affidavit, p. 1). They were then submitted for review to Kurt W. Muellenberg, Deputy Chief, and to William S. Lynch, Chief, Organized Crime and Racketeering Section, respectively, who recommended approval and forwarded them to Mr. Shapiro. Mr. Shapiro then, according to his affidavit, " \* \* \* examined the files and forwarded them to the Office of the Attorney General with detailed recommendations that the authorizations be granted." (See Shapiro affidavit, p. 2). As part of his function, Mr. Shapiro reviewed the letters of October 16 and November 6, 1970, respectively, purporting to be over the signature of Will Wilson, to Francis S. Brocato, advising him that he was authorized to present the applications to the court, and authorized the dispatch of those letters upon approval of the respective requests for authorization in the Office of the Attorney General.

Neither Mr. Shapiro's affidavit nor that of Mr. Lindenbaum sets forth the identity of the person who prepared the "Will Wilson letters" nor whether Will Wilson, in fact, ever had any knowledge of those letters prior to the respective applications to the court. In view of the government admission at the hearing of the supplemental motions to dismiss, the court need not concern itself with the lack of factual material in reference to these latter points.

Supplemental motions to suppress were filed by certain of the defendants on grounds related to the authorization procedures.



Title 18 U.S.C. § 2516(1) provides, *inter alia*:

The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for \* \* \* an order authorizing or approving the interception of wire or oral communications \* \* \*.

At the hearing on the supplemental motions to suppress, in response to questions by the court, government counsel admitted that no Assistant Attorney General was specially designated in this case by the Attorney General or on his behalf to exercise independent judgment to authorize a Title III application. The supplemental motions to suppress, therefore, will be decided by this court on the assumption that Will Wilson, as an Assistant Attorney General of the United States, did not perform any function in exercising independent judgment on his own responsibility to authorize the wiretap application in the present case and that his function was only to notify Francis S. Brocato and others concerned that on the authority and the responsibility of the Attorney General himself the wiretap application had been authorized. In other words, under the admission of the government, Mr. Wilson did not perform a function which was required under the statute to be performed by an Assistant Attorney General but, on the contrary, performed a messenger-type function which, under the statute at least, could have been performed by anyone.

The questions before the court, therefore, are (1) whether or not the purported exercise of the authority and responsibility of the Attorney General in this case, and the procedures followed subsequently relating to the authorization of the application, comport with the

statutory requirements of Title III, and (2) if not, whether any failures to comply with the statute are of such a nature as to require suppression of the evidence obtained from the wiretap.

Wiretapping legislation had been considered prior to 1968 in several sessions of the Congress. Especially instructive is a review of S. 1495 presented in the 87th Congress, First Session (1961). Section 4(b) of S. 1495, as originally proposed provided that:

The Attorney General or any officer of the Department of Justice or any United States attorney specially designated by the Attorney General, may authorize any investigative law enforcement officer of the United States or any Federal agency to apply to a judge of competent jurisdiction for leave to intercept wire communication \* \* \*.

That bill, as originally proposed, did not provide for either the application itself or for the order of court granting the wiretap approval to include any reference to the authorization of the application. *Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Wiretapping and Eavesdropping Legislation*, 87th Congress, First Session (May 9, 10, 11, 12, 1969) at 4-8.

At hearings on S. 1495 and related legislation, Herbert J. Miller, Jr., then Assistant Attorney General, Criminal Division, Department of Justice, in May 1961, testified in pertinent part as follows:

This is the approach of S. 1495, with which the Department of Justice is in general agreement. The bill makes wiretapping a crime unless specifically authorized by a Federal judge in situations involving specified crimes. As I understand the bill, the application for a court order could be made only by the authority of the Attorney General or an officer of the De-

partment of Justice or U.S. Attorney authorized by him. I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any Assistant Attorney General whom he may designate. This would give greater assurance of a responsible executive determination of the need and justifiability of each interception." *Ibid.* at 356.

On June 21, 1961, the Department of Justice submitted to Congress a proposed revision of S. 1495 which, for the first time, included precisely the same operative language as the present § 2516(1) of Title 18, United States Code. The Department of Justice proposed to modify § 4(b) of S. 1495 to read as follows:

The Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, may authorize an application to a judge of competent jurisdiction \* \* \*. *Ibid.* at 372.

The proposed revision recommended by the Department of Justice at that time to S. 1495 did not provide for the inclusion in the application to the court or in the court's order of any information concerning the authorization for the submission of the application to the court. *Ibid.* at 373-378.

On January 25, 1967, Senator McClellan introduced S. 675 dealing with wiretaps. Section 5(a) of the bill provided:

"The Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction \* \* \*." *Hearings Before the Subcommittee on Criminal Law and Procedures of the Committee on the Judiciary,*

*Controlling Crime Through More Effective Law Enforcement*, 90th Congress, First Session (March 7, 8, 9, 1967) at 76.

§. 675 did not require that either the application or the court order contain any information relating to the authorization of the application. *Ibid* at 75-79.

In 1967 there appeared in print for the first time a proposed bill in substantially the form in which Title III finally emerged. This proposed bill, authored by Professor G. Robert Blakey, then a consultant to the President's Commission on Law Enforcement and Administration of Justice, was attached as Appendix C to the *Task Force Report: Organized Crime* (The President's Commission on Law Enforcement and Administration of Justice). Professor Blakey's proposed bill provided in § 3801(a) thereof that "the Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General may authorize an application to a Federal judge of competent jurisdiction \* \* \*" and further provided in § 3803(a)(1) thereof for the first time in any proposal that the application to the court for a wiretap should include information on "Who authorized the application." *Ibid* at 108-109. Also for the first time, Blakey's bill provided in § 3804 that reports would be issued on each wiretap application to the Administrative Office of the United States Courts, and ultimately to the Congress, which would contain "the identity of \* \* \* who authorized the application." *Ibid* at 111. Blakey's bill at that time did not require the inclusion in the court's order of any information relative to the authorization of the application. *Ibid* at 110. In the text of the *Task Force Report*, after setting forth that there should be a limitation placed on the number of federal and state enforcement agencies who could employ electronic surveillance tech-

niques, it is stated that "even with this limitation of agencies, the power should be further circumscribed by requiring that the Attorney General (or his designates) shall sign and responsibly review all applications." *Ibid* at 103.

On June 29, 1967, Senator Hruska and others introduced S. 2050 which followed the Blakey bill very closely. Section 2516(a) of S. 2050, 90th Congress, First Session, provided that "the Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction \* \* \* to intercept wire or oral communications \* \* \*." *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, Controlling Crime Through More Effective Law Enforcement, supra*, at 1005. Section 2518(a)(1) of S. 2050 required the application to the court to set forth "the identity of the person who authorized the application." (Emphasis supplied). *Ibid* at 1006. S. 2050 did not contain any provision requiring the court's order to contain information concerning the authorization for the application to the court. *Ibid* at 1007. It retained, however, the Blakey bill requirement that a report be filed with the Administrative Office and Congress setting forth "the identity of \* \* \* who authorized the application." *Ibid* at 1008.

On October 12, 1967, H.R. 13482 was introduced in the House, and was then the latest version of what had come to be called the "Blakey bill," *Congressional Record*—Senate Volume 114, Part II, page 14473. That bill continued the language of S. 2050 as to (1) requiring that the Attorney General or a specially designated Assistant Attorney General be the authorizing officer, as to (2) requiring the identity of the au-

thorizing person to be set forth in the application, and as to (3) requiring a report to be filed with the Administrative Office and Congress setting forth the identity of the person who authorized the application. The bill, in section 2518(e)(4) thereof, for the first time required that the order of the court specify " \* \* \* the identity of whomever authorized the application." H.R. 13482, 90th Congress, Second Session (1967).

All of the various bills were considered by the Senate Committee on the Judiciary. This Committee in Senate Report 1097, dated April 29, 1968, recommended the passage by the Senate of S. 917, which contained the text of Title III as it was finally enacted by the Congress. U.S. Code Congr. & Adm. News, 90th Cong., 2d Sess. Vol. 2 (1968). Section 2516(1), of course, contained the same language, here relevant, which had appeared in all of the proposals since the Justice Department recommendations in 1961. Section 2518(1)(a) retained the requirement that the application to the court contain the identity of the persons authorizing the application which had first appeared in S. 2050, but in adding a requirement that the identity of the investigative or law enforcement office making the application be provided, it changed the terminology slightly and substituted in this section the words "officer authorizing the application" for "the person who authorized the application." Senate Report 1097, Senate Committee on the Judiciary, 90th Cong. 2d Sess. (1968), p. 15. It does not appear that the change in wording signified any intended change in meaning.

Senate Report 1097 also recommended the requirement, first proposed in H.R. 13482, that the order of court approving the interception contain information about the identity of the person authorizing the application, but the wording establishing that requirement

was changed. Section 2518(4)(d) of S. 917 as proposed in the committee report and as finally enacted into law provides that the order shall specify:

The identity of \* \* \* the *person* authorizing the application; (Emphasis supplied). *Ibid* at 16.

Section 2519(1)(f) of the bill reported on in Senate Report 1097 retains the concept of reporting to the Administrative Office and to Congress, but changes the wording slightly from previous proposals in requiring that the reports include "the identity of \* \* \* the *person* authorizing the application." (Emphasis supplied). *Ibid* at 18.

The Senate Report, in referring to § 2516(1) states:

Paragraph (1) provides that the Attorney General, or any Assistant Attorney General of the Department of Justice specifically designated by him, may authorize an application for an order authorizing the interception of wire or oral communications. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronics surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable *person*. This provision in itself should go a long way toward guaranteeing that no abuses will happen. (Emphasis supplied). 1968 U.S. Code Congr. & Adm. News, p. 2185.

In referring to § 2518(1)(a) the Committee Report says:

Subparagraph (a) requires the identity of the *person* who makes, and the *person* who authorize the applications to be set out. This fixes responsibility. (Emphasis supplied). *Ibid* at 2189.

In explaining the provisions of § 2518(4)(d) the Committee Report states:

Subparagraph (d) requires that the order note the agency authorized to make the interception and the *person* who authorized the application so that responsibility will be fixed. (Emphasis supplied) *Ibid* at 2192.

The Committee Report does not specifically refer to § 2519(1)(f), but instead states generally:

Section 2519 of the new chapter provides for a series of reports on the administration of the court order system. They are intended to form the basis for a public evaluation of the operation. The reports are not intended to include confidential material. They should be statistical in nature \* \* \*. It will assure the community that the system of court-order electronic surveillance envisioned by the proposed chapter is properly administered and will provide a basis for evaluating its operation. *Ibid* at 2196.

It is significant that the three places in the Committee Report which attempt to explain the meaning of the sections of Title III most relevant to this inquiry do so in terms of "an identifiable person" in each instance even though the word "person" appears only in § 2518(4)(d). This emphasis by the Committee on the use of the word "person" cannot be ignored.

Webster's Third New International Dictionary, Unabridged (G. & C. Merriam Co. 1966) defines the word "person" in part as follows:

An individual human being \* \* \*; the individual personality of a human being \* \* \*.

In the context of the Committee Report on the three sections of Title III most relevant to this discussion, this court believes that the word "person" was meant to mean a specific, identifiable, individual human be-



ing. Similarly, the word "person" as it appears in § 2518(4)(d) was intended to mean the same thing. Nothing in § 2510(6) of Title 18 leads to a contrary conclusion.

Having said all this, it still remains to determine the legislative intent or statutory scheme of Title III. As has been seen, one concern in the framing of Title III was to place the authority and responsibility for determining whether or not to seek a court order allowing an interception in a " \* \* \* publicly responsible official subject to the political process \* \* \* ." 1968 U.S. Congr. & Adm. News, p. 2185. The framers of Title III further reasoned that "centralization will avoid the possibility that divergent practices develop." These reasons relate, however, solely to the *fact* of authorization of the application to the court and not to the knowledge by others outside of the Department of Justice of the identity of the person who had in fact previously authorized the application.

Placement of the authority to make the decision of whether or not to authorize an application for a wiretap in the highest level of government and in a publicly responsible official subject to the political process was accomplished by the specific language of § 2516(1) which had been suggested by the Justice Department in 1961 and which was included in the major subsequent legislative proposals. It was realized, however, as time went on that § 2516(1) dealt only with the *fact of authorization* of the application. As has been seen, subsequent proposals, bit by bit, added the requirement that *the person who actually authorized the application must be made known* to the judge to whom the application was submitted and to those others to whom the contents of his order would be disclosed (see § 2518(4)(d), § 2518(8)(d), and § 2519(1)(f)). Knowledge by the judge, by the per-

sons to whom the contents of the order would ultimately be disclosed, and Congress and the public as a whole through the Reports of the Director of the Administrative Office of the United States Courts provided for in § 2519(3) were deemed to be necessary and appropriate to allow those concerned and interested the opportunity to fix the responsibility for the fact of the authorization of the application in a specific and identifiable person who is subject to the political process.<sup>8</sup>

The statutory scheme therefore sets up a two-step process. First, the application for the wiretap must be authorized by the Attorney General or by an Assistant Attorney General specifically granted authority to act by the Attorney General. Second, the identity of the person who authorized the application must be made known to the judge acting on the application and ultimately, through his order, to any person who is a party to a proceeding in which the contents of any intercepted communication or evidence derived therefrom are offered in evidence or otherwise disclosed in court. These two requirements are equally important in the legislative scheme. If the only important fact were that one of the persons given the power to act by § 2516(1) had in fact authorized the application, it would not have been necessary to add the additional provisions of § 2518 to require the identity of the acting official to be set forth in the application and order.

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<sup>8</sup> While the words "subject to the political process" may not be synonymous with confirmation by the Senate, cf. *United States v. Robinson*, *supra*, 40 L.W. at 2455; *United States v. Aquino, et al.*, Criminal 28578 (E.D. Mich. So. Div., Jan. 17, 1972), it at least means a person who is not subject to a merit system or Civil Service type appointment (see ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Electronics Surveillance, pp. 131-133).

If, by way of illustration, it is assumed that the Attorney General himself had authorized the application to be filed, it would obviously be a violation of the statute for the application and the order to state that not the Attorney General, but a specified Assistant Attorney General had authorized the application. The issuing judge, in the case of this illustration, and those persons who subsequently read his order would be misled and would place the responsibility for the authorization of the application upon the wrong person, that is, upon the specific Assistant Attorney General named in the application and the order rather than upon the Attorney General who had, in fact, authorized the application. It would not cure the difficulty in the factual framework of this illustration to establish subsequent to the issuance of the wiretap order that the application had in fact been authorized by the Attorney General himself rather than by the Assistant Attorney General named in the application and order, since the statute requires that the identity of the authorizing official be made known to the issuing judge before the order is entered by him. Thus both tests must be met and one alone will not suffice.

Rule 41(c) of the Federal Rules of Criminal Procedure requires that a warrant "shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. Although this requirement may be more of a constitutional one than the statutory two-prong test of §§ 2516(1) and 2518, the demand of Rule 41 for the affiant's name has been said to be based upon the similar premise that someone must take the *responsibility* for the facts alleged and that the defendant should be apprised of the name of that person.

When an incorrect name has been furnished either by design or by mistake, the warrant has been declared invalid. *King v. United States*, 282 F. 2d 398 (4th Cir. 1960); *United States v. Carignan*, 286 F. Supp. 284 (D. Mass. 1967); but see *United States v. Averell*, 296 F. Supp. 1004, 1015 (E.D.N.Y. 1969). Similarly the statutory scheme of Title III would be vitiated if the *wrong person* were named in the application for the wiretap and the order as the person who had in fact authorized the submission of the application.

In view of the two-prong test set up by § 2516(1) and by § 2518, this court believes that evidence would not be admissible to establish subsequent to the issuance of the order allowing the wiretap that authorization was in fact granted to make application for the wiretap where the issuing judge had no knowledge of, and his order did not refer to, such authorization. On the other hand, where the person who had in fact authorized the application is different from the person named in the application and the judge's order as having authorized the application, evidence establishing the true state of facts would be admissible subsequent to the issuance of the order for the purpose of impeaching or attacking the validity thereof.

This proposition, while based on an interpretation of the mandate of the statute, is not unlike the rule applicable to search warrants. Title III, as has been previously noted, establishes procedures which are analogous to those used in the application for, and execution of, search warrants. See *Berger v. New York*, 388 U.S. 41, 53-64 (1967); *United States v. Cox*, 449 F. 2d 679, 683-87 (10th Cir. 1971). The sufficiency of an application to a magistrate for a search warrant is required to be measured by the

application itself and the facts that are asserted under oath as a part of that application. The application may not be contradicted or expanded subsequent to the issuance of the warrant for the purpose of supplying information, or correcting information previously supplied, which is necessary to sustain the validity of the warrant. *United States v. Melvin*, 419 F. 2d 136 (4th Cir. 1969); *United States v. Roth*, 319 F. 2d 507 (7th Cir. 1967). Since responsibility is in the magistrate to determine whether or not there is sufficient information to provide probable cause for the issuance of a warrant, additional information provided subsequently, and which was not known to the magistrate at the time that he issued the warrant, cannot later be utilized to supply the requisite probable cause. On the other hand, the same premise that the magistrate has the responsibility to determine probable cause may lead one to the conclusion that gross error in the information presented to the magistrate can later be shown to demonstrate that, in fact, there was not sufficient information upon which to base a finding of probable cause for the issuance of a warrant. *King v. United States*, *supra*.

Getting back to the specific facts of this case, the government argues that the Attorney General authorized the application for the wiretap on October 16, 1970, acting through his *alter ego*, Sol Lindenbaum, his Executive Assistant. This argument seems to be tailored to the suggestion of Circuit Judge Clark in *United States v. Robinson*, *supra*, at 40 L.W. 2455, that such a procedure would seem to have more merit than the procedures upon which the government relied in that case. Even so, the *Robinson* court stated strongly that the *personal* attention of the Attorney General was required in the exercise of his function either to designate specially an Assistant Attorney

General to authorize the application or to authorize himself the application for the wiretap. The two other courts which have considered the question have reached the same conclusion as *Robinson*. *United States v. Aquino*, *supra*; *United States v. Cihal*, Crim. No. 71-61, — F. Supp. — (W.D.Pa., Jan. 13, 1972).

The government, while not relying upon the provisions of 28 U.S.C. § 510<sup>9</sup> does argue that the legislative intent of § 2516(1) has been satisfied because Lindenbaum acted in the name of the Attorney General himself. In other words, the government's argument seems to be that while the Attorney General delegated authority to his personal assistant to authorize the application, he did not delegate the responsibility for the action. Accordingly, so that argument would go, since the Attorney General has retained responsibility for the act of authorization, the legislative intent that there be "an identifiable person" upon whom the responsibility is fixed has been met.

It is no doubt true that in these days of proliferating governmental responsibilities, top-level officials must rely heavily upon intimate personal aides and, in some cases, act through them in order to be able physically to carry out their duties. It has been recognized that a personal aide and his employer in some circumstances can be treated as one. See *United States*

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<sup>9</sup> Section 510 provides: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee or agency of the Department of Justice of any function of the Attorney General." As Circuit Judge Clark stated in *Robinson*, "The legislative history of § 2516(1) as well as simple logic, compels the conclusion that § 510 must not be read as liberalizing the narrow limits Congress placed on who could initiate the wiretap process." 40 L.W. at 2455.

v. *John Doe, Mike Gravel, United States Senator, Intervener*, — F. 2d —, 40 L.W. 2491 (1st Cir., Jan. 7, 1972). The question of whether or not the Attorney General can exercise his responsibility and authority under § 2516(1) through his Executive Assistant is one which this court does not feel it is necessary to decide in this case.

Assuming that the Attorney General had properly authorized the application for the wiretap of the Giordano phone on October 16, 1970, the motions to suppress must be granted because both the application for a wiretap and the order of the issuing judge state that Will Wilson, an Assistant Attorney General specially designated for the purpose by the Attorney General, had been the one to authorize the submission of the application to the court. Paragraph Two of the affidavit and application of Francis S. Brocato, Assistant United States Attorney for the District of Maryland, states:

Pursuant to the power conferred upon him by § 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

The letter, dated October 16, 1970, and purporting to bear the signature of Will Wilson, reads in pertinent part as follows:

This is in regard to your request for authorization to make application pursuant to the pro-

visions of § 2518 of Title 18, United States Code, for an order of the court authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications \* \* \*.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Nicholas Giordina and others as yet unknown have committed, are committing, or are about to commit offenses \* \* \*. I have further determined that there exists probable cause to believe that the above person makes use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative techniques reasonably appear to be unlikely to succeed if tried.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by § 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an order of the court pursuant to § 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications from the facility described above, for a period of 21 days.

This letter together with Mr. Brocato's affidavit can have only one reasonable meaning. Any fair reading of those two documents together would identify Will Wilson as the person who reviewed and authorized on his own responsibility the submission of the application to the court and that he was an Assistant Attorney General who had been specially designated by the Attorney General to determine whether or not to authorize the application.



The order of the court, dated October 16, 1970, provided in part that the order was issuing.

"\* \* \* Pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the power conferred on him by § 2516 of Title 18, United States Code \* \* \*."

Again, the language of the order makes it crystal clear that the court was under the impression that Will Wilson on his own responsibility had authorized the application for the wiretap and that the Attorney General had specially designated Mr. Wilson as an Assistant Attorney General to determine whether or not the application should be authorized. The order in fact identifies Will Wilson as the person who authorized the application.

If the application and the order of court granting leave to institute the wiretap were allowed to stand, in spite of the fact that they did not correctly identify the person authorizing the application as required by the statute, one-half of the two-prong statutory scheme would be rendered a nullity. Such a gross error cannot be relegated to oblivion by terming it a "mere technicality" as the Assistant United States Attorney does in his understandable last-ditch effort to preserve his months of work on this case. The statute imposes an overall ban on the interception and disclosure of wire or oral communications, but, under a system of strict judicial supervision, it authorizes interception under certain circumstances in connection with the investigation of particularized serious crimes by certain law enforcement officers. As was

stated in *United States v. Cox, supra*, "If the officers have not complied with the strict requirements of the statute, the contents of the communication or evidence which stems from it can be suppressed \* \* \*." 449 F. 2d at 684.

Section 2518(10)(a)(ii) provides that a motion to suppress may be granted if the order "\* \* \* is insufficient on its face." If the order in this case had failed to identify the person who authorized the application, it would have been defective and insufficient on its face and certainly would have justified suppression of any evidence derived from the wiretap. In the view of this court, the misidentification of the person authorizing the application is no more a "technicality" than a failure to identify anyone, and similarly requires the granting of the motions to suppress.

The application and order relating to the extension of the wiretap are defective for the same reasons as the original application and order.

The motions to suppress the contents of any intercepted telephone communications under the orders in Misc. 739-N, dated October 16, 1970, and November 6, 1970, and the information obtained from the operation of the pen register under the orders in Misc. 737-N, dated October 22, 1970, and November 6, 1970, or any evidence derived therefrom, must be granted. An order has heretofore been entered in this cause granting the motions to suppress for the reasons expressed herein.

JAMES R. MILLER, Jr.,  
*United States District Judge.*

# APPENDIX E

## I. Pending cases in which the issue of the validity of authorizations to submit wiretap applications by Sol Lindenbaum has been raised with respect to 1 or more of the wiretaps involved in the case

Circuit	Case name	Citation or docket No.	Opinion in district court	Status
First.....		None.....		
Second.....	<i>U.S. v. Piscano</i> .....	439 F. 2d 239.....		Petition for certiorari pending No. 71-1410.
	<i>U.S. v. Becker</i> .....	460 F. 2d 230.....		Petition for certiorari pending No. 72-158.
Third.....	<i>U.S. v. Cihal</i> .....	No. 72-1201.....	336 F. Supp. 261..	Argued before a panel and listed for reconsideration <i>en banc</i> by the court by order of Aug. 4, 1972. Supplementary briefs filed. By order of submission date on reconsideration is Nov. 27, 1972.
	<i>U.S. v. Narducci</i> .....	No. 72-1422.....		Appeal pending; argument originally set for Sept. 8, 1972 postponed indefinitely in view of <i>Cihal</i> case.
	<i>U.S. v. LaGorya</i> .....	No. 72-1523.....		Appeal pending.
	<i>U.S. v. Baldassari</i> .....		338 F. Supp. 904..	Remanded to district court.
	<i>U.S. v. Lawson</i> .....		Crim. No. 71-53 (E.D. Pa., 1972).	Appeal pending.
Fourth.....	<i>U.S. v. Giordano</i> .....	No. 72-1407, 72-1399.	340 F. Supp. 1083 (D. Md. 1972) ( <i>U.S. v. Focurille</i> ).	Decided Oct. 31, 1972 adverse to government.
	<i>U.S. v. Gibson</i> .....	No. 72-1697.....	No written opinion.	Appeal pending, argued Oct. 30, 1972.
	<i>U.S. v. Amdusky</i> ..... (undocketed)		No. 143-71-N (E.D. Va., 1972).	Notice of appeal filed Oct. 30, 1972.
Fifth.....	<i>U.S. v. Robinson</i> .....	468 F. 2d 189.....		Reargument <i>en banc</i> Oct. 30, 1972. Remanded to district court Jan. 16, 1973.
Sixth.....	<i>U.S. v. Bassoline</i> .....	No. 72-1600.....	Crim. No. 46323 (E.D. Mich., 1972).	Appeal pending, oral argument scheduled Dec. 5, 1972.
	<i>U.S. v. Aquino</i> .....	No. 72-1716.....	338 F. Supp. 1080..	Appeal pending, oral argument held, Dec. 5, 1972.
	<i>U.S. v. Weirzbicki</i> ..... (undocketed)		Crim. No. 45884 (E.D. Mich., 1972).	Notice of appeal filed.

## APPENDIX E—Continued

## I. Pending cases in which the issue of the validity of authorizations to submit wiretap applications by Sol Lindenbaum has been raised with respect to 1 or more of the wiretaps involved in the case—Continued

Circuit	Case name	Citation or docket No.	Opinion in district court	Status
Seventh.....	<i>U.S. v. Smith</i> .....	No. 72-1637.....	Crim. No. 71-Cr. 832 (N.D. Ill., 1972).	Consolidated appeal pending.
	<i>U.S. v. Roberts</i> .....	No. 72-1514.....		
	<i>U.S. v. Learitt</i> .....	No. 72-1729.....	Crim. No. 71-Cr. 864 (N.D. Ill., 1972) ( <i>U.S. v. Gibbelera</i> ).	Appeal pending.
	<i>U.S. v. Fox</i> .....	No. 72-1982.....	Crim. No. 7088 (S.D. Ill., 1972).	Notice of appeal filed.
Eighth.....		None.....		
Ninth.....	<i>U.S. v. King</i> .....	No. 72-1592, 1602..	No written opinion.	Appeal pending, argued Oct. 7, 1972.
Tenth.....		None.....		
District of Columbia.	<i>U.S. v. Mantello</i> .....	No. 72-1519, 72-1521.	Crim. Nos. 335-71, 337-71, 336-71 (D. D.C., 1972).	Appeal pending.

## II. Pending cases in which the issue of the validity of authorizations to submit wiretap applications has been raised in which all of the authorizations were personally made by the Attorney General.

Circuit	Case name	Citation or docket No.	Opinion in district court	Status
First.....		None.....		
Second.....	<i>U.S. v. Consiglio</i> .....		342 F. Supp. 556...	
	<i>U.S. v. Wright</i> .....	No. 71-1737.....		Decided Sept. 5, 1972.
	<i>U.S. v. Fiorella</i> .....	No. 468 F 2d 688.....		Decided October 13, 1972.
Third.....	<i>U.S. v. Ceraso</i> .....	No. 467 F 2d 647..	391 F. Supp. 374....	Decided Aug. 16, 1972.
	<i>U.S. v. Delvecchio</i> .....	No. 72-1681.....	Crim. No. 14913 (M.D. Pa., 1972).	Appeal pending.
	<i>U.S. v. Cafero</i> .....	No. 72-1577, 72-1578.	Crim. No. 70-445 (E.D. Pa., 1972).	Appeal pending.
	<i>U.S. v. Gibbons</i> .....	(undocketed).....	Crim. No. 2174 (D. Del., 1972).	Appeal pending.
Fourth.....	<i>U.S. v. Boone</i> .....	(undocketed).....	Crim. No. 85-72-R (E.D. Va., 1972).	Notice of appeal filed.
Fifth.....	<i>U.S. v. Crabtree</i> .....	No. 71-2800.....		Argued, decision pending.
	<i>U.S. v. Kilgore</i> .....	No. 71-3559.....		Appeal pending.
	<i>U.S. v. Bourdoch</i> .....	No. 71-2304.....		Argued, decision pending.
	<i>U.S. v. Sklaroff</i> .....	No. 71-2948, 71-3192.		Appeal pending.
Sixth.....		None.....		
Seventh.....	<i>U.S. v. Finn</i> .....	No. 72-1953.....	No. 72-Cr. 250 (N.D. Ill., 1972).	Notice of appeal filed.

## APPENDIX E—Continued

*II. Pending cases in which the issue of the validity of authorizations to submit wiretap applications has been raised in which all of the authorizations were personally made by the Attorney General.—Continued*

Circuit	Case name	Citation or docket No.	Opinion in district court	Status
Eighth.....	U.S. v. Cox.....	462 F. 2d 1293.....		Petition for certiorari pending No. 72-5278.
Ninth.....	U.S. v. Simon.....	Nos. 72-1436, 72-1461, 72-1659, 72-1663, 72-1723.		Appeal pending, argued.
	U.S. v. Charez.....	No. 72-2240.....	Cr. No. 71-406-SAW (N.D. Cal., 1972).	Appeal pending.
	U.S. v. Vasquez....	(undocketed).....	Cr. No. 7072 (C.D. Cal., 1972).	Appeal pending.
Tenth.....		None.....		
District of Columbia.		None.....		

## APPENDIX F

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### STATUTES INVOLVED

28 U.S.C. 510 provides:

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

18 U.S.C. 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2516 provides, in pertinent part:

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications \* \* \*.

18 U.S.C. 2518 provides in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

\* \* \* \*

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

\* \* \* \*

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

\* \* \* \*

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

\* \* \* \*

OCT 16 1973

No. 72-1057

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**In the Supreme Court of the United States**

OCTOBER TERM, 1973

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UNITED STATES OF AMERICA, PETITIONER

v.

DOMINIC NICHOLAS GIORDANO, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES**

---

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1973**

---

**No. 72-1057**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**DOMINIC NICHOLAS GIORDANO**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES**

---

## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 469 F. 2d 522. The opinion of the district court (Pet. App. 23a-77a) is reported at 340 F. Supp. 1033.

## **JURISDICTION**

The judgment of the court of appeals (A. 108) was entered on October 31, 1972. A petition for rehearing was denied on December 27, 1972 (Pet. App. 20a). On January 26, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 31, 1973. The petition was filed on that date, and was granted on March 26, 1973 (A. 110).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether suppression of probative evidence is the appropriate or necessary way of dealing with any former inconsistencies between the Justice Department's internal review of proposed wire interception applications, before their submission to a federal judge, and the procedures outlined for this purpose by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, when these procedures had no bearing on the judge's determination of probable cause and necessity and were, in any event, revised more than a year ago.

2. Whether under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Attorney General's Executive Assistant could validly act when the Attorney General was unavailable in approving the submission of wire interception orders to federal judges, and whether the inadvertent indication in court applications that they had been approved by an Assistant Attorney General rather than by the Attorney General or his Executive Assistant invalidated any ensuing court orders.

#### STATUTES INVOLVED

28 U.S.C. 509-510 and the relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520) are set forth in the Appendix, *infra*.

## STATEMENT

The respondents ("defendants") were charged in separate but related cases with narcotics offenses in violation of 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 4701 *et seq.* Prior to trial, the government notified the defendants that it intended to introduce evidence obtained from wire interceptions conducted under court orders issued on October 16, 1970, and November 6, 1970, pursuant to 18 U.S.C. 2510-2520 (Title III, Omnibus Crime Control and Safe Streets Act of 1968). The district court granted defendants' motions to suppress on the ground that the procedure under which the applications for the wire interception orders were authorized within the Department of Justice was invalid, because the applications inaccurately indicated that the Assistant Attorney General in charge of the Criminal Division was the official who had approved the submission of the applications. The court of appeals affirmed on the different ground that the official who had actually authorized the submission of the initial application, the Attorney General's Executive Assistant, could not validly exercise such power even upon delegation by the Attorney General.

Because of the importance of the issues raised by this case for scores of similar prosecutions, we consider it appropriate to describe in detail the general practice in the Department of Justice in reviewing proposed wire interception applications from the enactment of Title III in 1968 to the present. The procedure found defective by the court of appeals—authorization of applications by the Attorney General's Executive Assistant—began in early 1970 and was discontinued in November of 1971. The practice found defective by the

district court—the appearance on the application of the name of the Assistant Attorney General in charge of the Criminal Division—was followed from the first applications in 1969 until the spring of 1972. After describing the general procedures, we shall discuss the steps followed in this case.

# I. PROCEDURES WITHIN DEPARTMENT OF JUSTICE FOR REVIEWING PROPOSED WIRE INTERCEPTION APPLICATIONS 1968-1971

The following procedures were used in authorizing the filing of the approximately 525 applications for wire interception orders that were approved within the Department of Justice from the enactment of Title III in 1968 through ~~early 1972, when the delegation procedures were revised,~~<sup>1</sup> and the spring of 1972 when the application form was revised. ✓

When a formal request for authorization to apply for an interception order was received from attorneys or investigators in the field, the accompanying file, which included copies of the proposed affidavit, application and order, was examined in a special unit of the Organized Crime and Racketeering Section of the Criminal Division. The attorneys in that unit had as their primary function the review of such papers for form and substance, with particular emphasis on assuring strict adherence to the required statutory, judicial, and constitutional standards. If the file was approved by these attorneys, it was forwarded with their

<sup>1</sup> See Administrative Office of the United States Courts, Reports on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for 1969, 1970 and 1971 (Table A). The provisions for federal wire interceptions were first utilized in 1969.

recommendations to the Deputy Chief or Chief of the Organized Crime and Racketeering Section, who added his recommendation. The file was then sent to the Office of the Assistant Attorney General in charge of the Criminal Division, where it was reviewed by a Deputy Assistant Attorney General, who made a judgment on the request on behalf of the Criminal Division (A. 100-101).

If at any point in the review within the Criminal Division a decision was made that the application was insufficient, the file was returned to the applicant without approval. The application was not forwarded unless the reviewer at each level was satisfied that the request was justified. The bulk of the review was conducted in the special unit; each successive level reviewed the summary and recommendations of the lower levels, unless some question arose that required more extensive examination of the documents (*Marder* Tr. 136, 140-142, 160, 164-165, 189-191, 193-194, 197-198).<sup>2</sup>

The file, with the recommendation of the Criminal Division, then was sent to the Office of the Attorney General, where the Executive Assistant to the Attorney General, Sol Lindenbaum, reviewed it. In most instances the file, with Mr. Lindenbaum's recommendation, then was submitted to the Attorney General for his personal approval, which he indicated by personally initialling a memorandum to the Assistant Attorney General in charge of the Criminal Division,

<sup>2</sup> Transcript of hearing held on March 19 and 20, 1973, in *United States v. Marder* (S.D. Fla. No. 71-414-CR-WM) and other cases in the Southern District of Florida, a copy of which is being lodged with the Clerk of this Court. See *infra* at p. 12.

Will Wilson. This memorandum was prepared in the Criminal Division and came to the Office of the Attorney General with the file. In some cases, if the Attorney General was out of town, Mr. Lindenbaum would discuss the case with him by phone, and Mr. Mitchell would direct Mr. Lindenbaum to initial the memorandum on his behalf.<sup>3</sup> After experience with the procedure, and pursuant to the instructions of Mr. Mitchell given in the spring of 1970, in some cases (discussed *infra*) Mr. Lindenbaum himself determined that approval of the application was consistent with the Attorney General's policy, and placed Mr. Mitchell's initials on the memorandum to Assistant Attorney General Wilson.

This memorandum, which accompanied the file back to the Criminal Division, directed Assistant Attorney General Wilson to authorize the trial attorney to submit the application to the court.<sup>4</sup> (This form, because

<sup>3</sup> See *United States v. Pisacano*, 459 F. 2d 259, 263 (C.A. 2), petition for certiorari pending, No. 71-1410. The validity of this telephone approval procedure is in issue in *Cuzzo v. United States*, petition for certiorari pending, No. 72-1267, and *Posner v. United States*, petition for certiorari pending, No. 72-1484, in which the Second and Seventh Circuits respectively upheld this practice.

<sup>4</sup> The form memorandum stated in part (A. 98-99):

"This is with regard to your recommendation that authorization be given to [the particular trial attorney] to make application for an Order of the Court under Title 18, United States Code, Section 2518 permitting the interception of wire communications for a [particular] period to and from telephone number [the listed telephone numbers of the particular criminal investigation] \* \* \*."

"Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing [the particular trial attorney] to make the above-described application."

it tracked the language of Section 2516(1), did not make clear that the operative decision was made in the Attorney General's Office and that the Assistant Attorney General's function was simply one of notification.) A letter of authorization was then dispatched to the applicant, the form for which concluded:

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18 United States Code, authorizing the [particular federal agency] to intercept wire communications from the facility described above for a period of [the particular number of days] [A. 26, 65].<sup>5</sup>

Pursuant to the general directions of Assistant Attorney General Wilson, and in accord with the normal procedure followed in the Department of Justice, his signature was affixed to such letters by one of his ranking subordinates, a Deputy Assistant At-

<sup>5</sup> The "Wilson" form letter was drafted to comply with § 1.5 of the Justice Department's *Manual for Conduct of Electronic Surveillance Under Title III of Public Law 90-351*. Section 1.5 provided:

"1.5 *Manner in which authorization will be given.*

"A letter over the signature of the Attorney General or of the specially designated Assistant Attorney General will authorize the person named in the request for authorization \* \* \* to apply for the interception order. The applicant should usually be the supervising attorney, and when it is requested that an agent rather than the attorney make the application, the reasons for that request should be specifically set out."

torney General, either Harold P. Shapiro or Henry E. Petersen.<sup>6</sup> This form letter of authorization was used in approximately 159 cases, involving 1,433 defendants, now pending in various federal courts.

When the application was filed in the district court by the trial attorney, the letter of authorization and the supporting affidavits were attached. This application typically stated in part (A. 22, 60):

Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division \* \* \*, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications.

Thereafter, in annual reports filed pursuant to 18 U.S.C. 2519 with the Congress by the Administrative Office of the United States Courts the Attorney General reported that he "personally approved each of the reported applications and, as authorized by provisions of Title 18 U.S.C., Section 2516, specially designated an Assistant Attorney General to authorize its filing."

Since November 1971, when the Department of Justice revised its internal procedures for the approval of wire interceptions, the Attorney General has per-

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<sup>6</sup> The same Deputy Assistant Attorney General who reviewed the file and made the recommendation later affixed Wilson's signature to the letter of authorization after approval in the Attorney General's Office. See Appendix in the accompanying case of *United States v. Chavez*, No. 72-1319 (A. 85-86, 89-90).



sonally approved all interceptions. (On two occasions, when Attorney General Kleindienst was unavailable to sign the approval, his signature was affixed by his Executive Assistant, after discussing the case with the Attorney General by telephone and noting on the document that he had signed pursuant to the conversation.)<sup>1</sup> It was not until the spring of 1972, however, that the Department's internal forms by which the applications were approved and the applicable form language in the applications and orders were changed to reflect the new practice, *i.e.*, to show that it was the Attorney General and not the Assistant Attorney General who had given the approval.

## II. THE AUTHORITY OF THE ATTORNEY GENERAL'S EXECUTIVE ASSISTANT TO ACT FOR THE ATTORNEY GENERAL

The first of the two applications in this case was approved by the Attorney General's Executive Assistant when the Attorney General was unavailable, as were applications in approximately 60 similar cases, involving 626 defendants, now pending in various federal courts. (All of these cases also involve the use of the form letters discussed above.)

The position of Executive Assistant to the Attorney General is established as a formal part of the Office of the Attorney General. See 28 C.F.R. § 0.6. Under the published regulations, his duties are, *inter alia*, to:

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<sup>1</sup> When former Attorney General Kleindienst was unavailable for a two-week period, he specially designated Assistant Attorney General Henry Petersen by written order to authorize wire interception applications during that period.

(a) Assist the Attorney General in the review of opinions, interpretations, decisions of the Board of Immigration Appeals, applications for pardon and other forms of Executive clemency, antitrust complaints, contracts, agreements, and proposed offers in compromise, and other matters submitted for the Attorney General's action.

(b) Perform such other duties and functions as may be specially assigned from time to time by the Attorney General.

Mr. Lindenbaum has served as Executive Assistant to Attorneys General Ramsey Clark, John N. Mitchell, Richard Kleindienst, and Elliot L. Richardson.

The delegation to Mr. Lindenbaum of the authority to act on Title III applications has been described by Mr. Lindenbaum and Mr. Mitchell in affidavits filed in various cases now pending in this Court and others,<sup>8</sup>

<sup>8</sup> Affidavits by Mr. Lindenbaum have been filed in every case in which the issue has been raised, including the present case and *United States v. King*, pending on petition for certiorari, No. 72-1320 (Pet. App. 20-21); *United States v. Chavez*, No. 72-1319, certiorari granted, May 21, 1973 (Pet. App. 3a); *United States v. Robinson*, 472 F. 2d 973, 978-980 (C.A. 5); *United States v. Robinson*, 468 F. 2d 189, 191 (C.A. 5); *United States v. Aquino*, 338 F. Supp. 1080, 1085 (E. D. Mich.); *United States v. Cihal*, 336 F. Supp. 261, 262-263 (W. D. Pa.).

Affidavits of former Attorney General Mitchell have been filed in some cases where Mr. Lindenbaum acted for him, describing Lindenbaum's authority to act when Mitchell was unavailable. See, e.g., *United States v. King*, *supra*, No. 72-1320 (Pet. App. 19-20); *United States v. Roberts, et al.*, pending on petition for certiorari, No. 72-1475. This authority has also been described by Mr. Mitchell in his answer to written interrogatories in *United States v. Grosso, et al.*, No. 70-102 Criminal (W.D. Pa.). In other instances, Mr. Mitchell has described Mr. Lindenbaum's authority to act for him in affidavits filed in

in testimony in a recent hearing held in the United States District Court for the Southern District of Florida in *United States v. Marder, et al., supra*, note 2, and, finally, in answers to written interrogatories.

These descriptions record that Attorney General Mitchell expressly authorized his Executive Assistant to act for him in wire interception matters, under certain circumstances, in the spring of 1970, after Mr. Lindenbaum had become thoroughly familiar with the Attorney General's policies in authorizing these applications. There was no written delegation,<sup>9</sup> but Mr. Lindenbaum stated that the Attorney General acted pursuant to 28 U.S.C. 510, his general authority to delegate his duties to his subordinates.<sup>10</sup> He further stated in another case that he informed Mr. Mitchell "as soon as practicable [after authorizing an application] so that he could order the interceptions terminated if he did not approve of them. He did not direct termination of any of these interceptions."<sup>11</sup>

Mr. Mitchell's affidavits agreed. He has stated, for example:

cases where Mr. Mitchell personally approved the applications. See, e.g., *United States v. Doolittle*, 341 F. Supp. 163, 170-171 (M.D. Ga.); *United States v. Ceraso*, 467 F. 2d 647, 650-651 (C.A. 3). Affidavits of Mr. Mitchell filed in still other cases were limited solely to the fact that he had personally authorized the application in the particular case. See, e.g., *United States v. Chavez, supra*, No. 72-1319 (Pet. App. 4a).

<sup>9</sup> *Marder Tr.* at 55, 215-216.

<sup>10</sup> Affidavit in *United States v. Robinson*, 468 F. 2d 189, 191 (C.A. 5). The text of 28 U.S.C. 510 is set out in Appendix A, *infra*, p. 79.

<sup>11</sup> Affidavit in *Robinson, supra*, note 10.

Somewhat more than a year after this Department first utilized the provisions of Title III, I verbally [orally] authorized my Executive Assistant to act on my behalf on requests that might be transmitted by the Criminal Division at a time when I was not available to act on them. I gave him this authority in the light of his familiarity with my policies and with my decision on all requests that had been previously submitted to me. My subsequent review of cases in which he approved requests on my behalf confirmed that he followed my policies.<sup>12</sup>

Both Mr. Mitchell and Mr. Lindenbaum later testified at the *Marder* hearing on March 19, 1973, concerning Mr. Lindenbaum's authority to act for the Attorney General. The testimony there related to several cases that were consolidated for an evidentiary hearing.<sup>13</sup> Mr. Lindenbaum testified that Mr. Mitchell had authorized him to approve Title III applications in his stead during Mr. Mitchell's trip to England (*Marder* Tr. 208), and that he had discussed another application in a phone call to Mr. Mitchell in Florida, and then initialled it at his direction (*Marder* Tr. 210-211). He also testified that if Mr. Mitchell could not be reached by telephone, and it was apparent that prompt action was necessary, he understood himself to have the authority to approve the application

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<sup>12</sup> Affidavit filed in *United States v. King* (C.A. 9), petition for certiorari pending, No. 72-1320 (Pet. App. 20), and *United States v. Roberts*, petition for certiorari pending, No. 72-1475.

<sup>13</sup> Mr. Lindenbaum had authorized one of the interceptions there at issue when Mr. Mitchell was in England; Mr. Mitchell had personally authorized the rest, one of them from Florida after Mr. Lindenbaum discussed the case with him by phone.

when Mr. Mitchell was in the country (*Marder Tr.* 215-216, 237).

Some of the testimony by former Attorney General Mitchell about the scope of the delegation to his Executive Assistant seems to have a slightly different cast about when the Attorney General was to be considered "unavailable". At the hearing, Mr. Mitchell testified:

In cases where during the period—I believe it would be from sometime in the early part of 1970 to sometime in the fall of 1971—where I would be out of the city, but in reach through telephone communications, my executive assistant, Mr. Sol Lindenbaum, would communicate with me and recite that there had been submitted to the Attorney General's office, through the Criminal Division, the papers covering applications for intercept orders, and we would discuss them on the telephone, and I would give him verbal authorization with respect to the initialing of such documents with my initials [*Marder Tr.* 46-47].

Mr. Mitchell was asked to describe the procedure when he was "out of the country and unavailable" (*Tr.* 54). He replied:

Under these circumstances I authorized my executive assistant, Mr. Sol Lindenbaum, who had worked with me from the inception of this program, [and] was fully cognizant of the procedures to be followed, he was fully cognizant \* \* \* [of] the practices that we followed, the manner in which we approached those authorizations, and he was specifically authorized by me to approve these authorizations in my name [*Marder Tr.* 54-55].

Mr. Mitchell was asked on cross examination whether there was any "occasion when you were in the country and he could not contact you." He replied, "[n]ot to my recollection" (*Marder* Tr. 79). Therefore, he did not testify concerning the scope of Mr. Lindenbaum's authorization in those circumstances, which were, in any event, not before the court. Mr. Mitchell's testimony is not free from ambiguity, and could be read as reflecting a much narrower scope of delegation than has generally been described. At one point Mr. Mitchell answered affirmatively the question, "So the only time that he would sign without contacting you is if you happened to be out of the country?" (Tr. 58). It seems fair to interpret his testimony, nevertheless, as focused only on the scope of Mr. Lindenbaum's authority to act in the cases under consideration at that hearing—where Mr. Mitchell had acted personally on the applications, including by telephone, except for the one instance in which Mr. Lindenbaum acted himself when the Attorney General was out of the country and unavailable. For reasons to be given, there is little reason to infer that Mr. Mitchell intended to define the full extent of that authority insofar as it covered cases not there at issue.

Mr. Mitchell's testimony was characterized by the Florida federal court's opinion in *United States v. Davis*, S.D. Fla., No. 72-241-CR-JE, one of the cases consolidated with *Marder* for a hearing which involved an authorization when Mr. Mitchell was in England. The court stated in its opinion, filed on June 4, 1973:

Both Mitchell and Lindenbaum testified that the Attorney General had authorized Linden-

baum to act in such matters when Mitchell was out of the country and unavailable. Lindenbaum also testified that there were occasions when Mitchell was in the country and even in the Washington, D.C. area and that he (Lindenbaum) acted on Title III authorizations when *he* determined that the situation could not wait for Mitchell to become available. [Op. p. 5; emphasis in original.]<sup>14</sup>

Subsequent to the testimony in the *Marder* hearing, however, Mr. Mitchell furnished answers to interrogatories filed in a case involving an application authorized by Mr. Lindenbaum when Mr. Mitchell was in the coun-

<sup>14</sup> The same judge, after presiding at the hearing described above, made the following finding of fact at the remand proceedings ordered in *United States v. Robinson*, 472 F. 2d 973 (C.A. 5): "At some unspecified time prior to the authorizations in this case, the Attorney General delegated to his Executive Assistant, Sol Lindenbaum, a general authority pursuant to 28 U.S.C. 510 to authorize wiretap applications in his absence. The record is clear, however, that this delegation was not *ad hoc* but was, at best, general and unproscribed and was, at worst, formally non-existent [S.D. Fla., No. 70-333-CR-WM, opinion filed March 23, 1973]."

At the remand hearing in *United States v. Laff, et al.* (S.D. Fla., No. 70-450-CR-PF), the same district judge after the *Marder* hearing stated (opinion filed May 31, 1973): " \* \* \* Mitchell further testified that it was part of his policy to have Lindenbaum communicate with him by telephone for oral authorization to place the Attorney General's initials on these memoranda (Tr. 78-79). Lindenbaum was supposed to act independently only when Mitchell was out of the country and unavailable. Lindenbaum's testimony revealed that he had exercised the Attorney General's power to initiate wiretap applications on occasions when Mitchell was in the country and also when he was in the Washington, D.C. area [Tr. 215-16, 237-38]."



try, but not otherwise available. In *United States v. Grosso*, No. 72-102 Cr. (W.D. Pa.), Mr. Mitchell stated:

About April 1, 1970, I verbally [orally] authorized my Executive Assistant to act on my behalf on electronic interception application authorization requests which might be transmitted by the Criminal Division at a time when I was not available to act on them. I gave him this authority in the light of his familiarity with my policies and with my decisions of all the requests that had been previously submitted to me \* \* \*.

It therefore seems clear that at the times relevant in this and similar cases, the Attorney General had given advance authority to his Executive Assistant to approve the submission of wire interception applications if, in the judgment of the Executive Assistant, the Attorney General was not, as a practical matter, "available" to review the papers personally, whether Mr. Mitchell was in or out of the country. Indeed, in light of Mr. Mitchell's affidavits in other cases in which Mr. Lindenbaum acted for him when he was actually in the country but unavailable, affidavits offered to confirm that Mr. Lindenbaum had acted in those matters within the scope of his delegated authority,<sup>15</sup> no other conclusion is reasonable.

### III. THE PROCESSING OF THE WIRE INTERCEPTION APPLICATIONS IN THE PRESENT CASE

Respondents, as we have stated above, moved to suppress the fruits of the two court approved wire

<sup>15</sup> See, e.g., affidavits in *United States v. King*, *supra*, No. 72-1320, and in *United States v. Roberts*, *supra*, No. 72-1475, both pending in this Court on petitions for writs of certiorari.



interceptions in this case. The government opposed those motions and filed affidavits of Mr. Lindenbaum (A. 95-98), and Harold P. Shapiro, Deputy Assistant Attorney General, Criminal Division (A. 99-101), describing the challenged procedures outlined above and followed in this case. The affidavits showed that, in accordance with the general procedures, the file concerning the first proposed wire interception application (approved by the district judge on October 16, 1970) went to the office of the Attorney General after review and a favorable recommendation by the Criminal Division (A. 100-101).<sup>16</sup>

Mr. Lindenbaum reviewed the file and concluded from his knowledge of the Attorney General's actions in previous cases that the Attorney General would approve the request. Since the Attorney General was not available, Mr. Lindenbaum approved the request

<sup>16</sup> The file contained the affidavit that was to be submitted in support of the proposed wire interception order. It showed that on October 5, 1970, respondent Giordano had sold 110 grams of heroin to a confidential informant and a narcotics agent working in an undercover capacity. The affidavit stated that the heroin was the purest ever discovered in a narcotics transaction in Baltimore. (Drugs are usually adulterated by each supplier through whose hands they pass. Therefore, the purity of the heroin indicated that it had been obtained from a very high level supplier.) The affidavit also stated that a check of toll records for Giordano's telephone and information from a pen register device (a device that keeps a record of the telephone numbers dialed from a particular phone), installed on Giordano's telephone line pursuant to a prior court order, showed numerous telephone calls from that telephone to known narcotics violators. In addition, the affidavit showed that other investigative techniques had been tried unsuccessfully and described in detail the reasons that surveillance or infiltration of the Giordano business was not feasible (A. 26-36).

on his behalf, and affixed the Attorney General's initials to the memorandum addressed to the then Assistant Attorney General in charge of the Criminal Division, Will Wilson, informing him of the approval and designating him to authorize the attorney in the field to submit the application to a district judge (A. 97-98). The "Wilson letter" was then sent to the applicant, and the application was filed in court. After making the determination as to probable cause and the satisfaction of other statutory prerequisites (see Section 2518(3)), the court issued the order permitting the wire interception.

The file concerning the application to extend the interception was subsequently sent to the office of the Attorney General after similar review by the Criminal Division.<sup>17</sup> This application was personally approved by the Attorney General, who personally initialed the memorandum addressed to Assistant Attorney General Wilson (A. 97-99). The extension of the previously authorized interception was granted by the court on November 6, 1970.

#### IV. THE RULINGS OF THE COURTS BELOW

After a hearing, the district court issued an opinion (Pet. App. D, pp. 23a-77a) and order (Pet. App. C,

<sup>17</sup> The proposed supporting affidavit referred to the October 16 order, reasserted all of the facts from the prior affidavit, and described the results obtained from the resulting interception. It also described the results of a concentrated surveillance of Giordano, and gave details of an October 17, 1970, sale of 113 grams of heroin to a confidential informant and a special agent for \$3,800. The affidavit concluded that Giordano was part of a large narcotics conspiracy, but that his source of supply had not yet been established. Once again, the insufficiency of normal investigative techniques was also shown (A. 65-81).

pp. 21a-22a) suppressing the evidence obtained from the wiretaps on the ground that the officer authorizing the applications was not properly identified in the application and order as required by 18 U.S.C. 2518 (1)(a) and 2518(4)(d), because the papers seemed to indicate that Assistant Attorney General Wilson had personally decided to submit the application rather than the Attorney General's Executive Assistant, in one instance, and the Attorney General himself in the other.<sup>18</sup>

On the government's appeal under 18 U.S.C. 3731, the court of appeals affirmed without reaching the identification issue, relied on by the district court. Instead, it held that the initial application for the wire interception order of October 16, 1970, was not submitted to the court in accordance with 18 U.S.C. 2516 (1), because the Attorney General's Executive Assistant had exercised the power to authorize the application, which the court held the Attorney General was not able to delegate to him. The court also held, over

<sup>18</sup> The district court first held (1) that the statute is constitutional; (2) that there was a sufficient showing of necessity for the wiretap; (3) that the interception was properly conducted; and (4) that there was sufficient showing of probable cause, the period of interception was not unreasonably long, and the applications and orders were otherwise sufficient. The court also held that the requirements of Title III were not applicable to the use of pen register equipment (which only records the numbers to which outgoing calls are placed, and does not detect the conversations themselves) and that a pen register order of October 8, 1971, issued pursuant to the requirements of Rule 41 Fed. R.Crim.P. was valid. The court ruled, however, that evidence obtained from two subsequent pen register extension orders had to be suppressed as the "fruit of the poisonous tree" because they depended on information obtained from the suppressed telephone interceptions.

the government's contrary arguments, that Sections 2515 and 2518(10) required that the consequence of such a procedural error must be suppression of the evidence gathered (Pet. App. 8a-19a).<sup>19</sup>

#### SUMMARY OF ARGUMENT

This case presents the issue whether evidence collected through wire interceptions conducted under court orders issued on the basis of findings of probable cause and necessity, as required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, should be suppressed because of the procedures followed within the Department of Justice in authorizing the submission of the applications to the court. We contend that the order of suppression entered by the district court and affirmed, on different grounds, by the Court of Appeals for the Fourth Circuit was erroneous.

The evidence in question should be admitted at the trial on each of two independent grounds:

(1) Suppression of the evidence is not a proper or useful remedy on any view of the Department's compliance with the internal procedure provisions of Title III; and, in any event,

(2) The Department's internal procedures complied with the internal procedure provisions of Title III.

#### I

Evidence whose accuracy and relevance is clear ought not be suppressed unless suppression would

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<sup>19</sup> The court of appeals did not discuss the pen register evidence or the wiretap extension application by former Attorney General Mitchell.

serve an important public purpose. Suppression in this case serves no ascertainable goal.

The wire interceptions at issue here did not violate the defendants' rights under the Fourth Amendment to the Constitution. They were made pursuant to court orders based upon findings that the government had shown probable cause and necessity for the use of electronic surveillance. Every constitutional requirement enunciated in *Berger v. New York*, 388 U.S. 41, and *Katz v. United States*, 389 U.S. 347, was observed. The defendants have, therefore, no valid Fourth Amendment objection to the admission of the evidence derived from the wire interceptions.

The internal procedures complained of, moreover, do not affect the accuracy and reliability of the evidence obtained. We do not understand either the defendants or the courts below to make any suggestion of the sort. There is, therefore, no question, raised by these procedures, of convicting the innocent.

The sole argument the defendants can make, and the essential rationale of the courts below, is that suppression of the evidence is required to ensure that future Attorneys General do not use these procedures but instead comply more literally with the internal procedures prescribed by Title III for the authorization of wire interception application. Suppression was ordered solely to deter possible future intra-office delegations of authority to sign authorizations and to require better identification of the person making the authorization. That purpose is not compelling, since the procedures under attack in this case were revised more than a year ago and there is no realistic possibility that the Department of Justice, in light of its experience

with the litigation they generated, would ever reinstate them.

Nothing in Title III itself requires suppression of evidence in this case. The suppression provisions, Sections 2515 and 2518(10)(a), insofar as they are applicable here, are declarative of existing constitutional law. These sections do not, therefore, require suppression in a case where all Fourth Amendment safeguards were observed. These provisions were not intended to apply to what were at most minor and technical departures from the statute's preliminary procedures, departures that did not infringe any constitutional rights of the defendants.

The remaining question is whether the federal judiciary should nevertheless order suppression to penalize the government for any deviation from the preliminary requirements of Title III. Suppression would be proper only if the Court determined that the balance of policy objectives required the sacrifice of otherwise admissible evidence in order to deter like procedures in the future.

The issues are thus almost identical to those faced by this Court in deciding whether or not to give retroactive effect to newly announced constitutional principles under the Fourth Amendment. The sole difference is that constitutional rules were involved there and statutory procedures here. In that light, the decisions in *Linkletter v. Walker*, 381 U.S. 618, and *Desist v. United States*, 394 U.S. 244, not to apply retroactively the exclusionary rules of, respectively, *Mapp v. Ohio*, 367 U.S. 643, and *Katz v. United States*, *supra*, should be controlling here. The policy



factors are much the same. Therefore, even without considering the merits of the defendant's statutory arguments, the judgment requiring suppression should be reversed.

## II

The internal procedures followed by the Department of Justice in approving the applications submitted to the district court in this case complied with Title III.

Under Section 2516, the Attorney General personally could establish the policy and procedure governing electronic surveillance applications and accept the personal responsibility for all applications actually submitted, as he did here, or he could have delegated that power and responsibility to a specially designated Assistant Attorney General. Neither the legislative history nor the policy of the statute indicates that it precluded the Attorney General from authorizing his Executive Assistant to apply the Attorney General's specific policies in particular cases and to act for him in authorizing the filing of particular wiretaps when he was unavailable. The Attorney General formulated the policy to be applied and retained personal responsibility for the individual authorizations. At least to the limited extent exercised here, the Attorney General's general authority to delegate functions to his subordinates, contained in 28 U.S.C. 510, allowed him to permit the senior official in his office to act upon individual applications without violating the terms of Title III.

Nor was the inaccurate identification of the Assistant Attorney General as the authorizing officer a

violation of Title III. Sections 2518(1)(a) and 2518(4)(d) complement Section 2516 by requiring the identification in the application and order of the officer in whose name the application is filed, so that he can be held accountable, primarily to Congress, for any abuses that occur. This primary purpose was not subverted here by naming the Assistant Attorney General in each case as the person "specially designated" by the Attorney General to authorize the application. The Attorney General's personal involvement was acknowledged in the applications. In addition, it was easy to trace the lines of responsibility to the Attorney General's office since the Report of the Administrative Office of the United States Courts—while identifying Assistant Attorney General Wilson as the authorizing official—stated the Attorney General approved each of the reported applications.

### III

To the extent one or both of the wire interception orders here may be found invalid because of the Justice Department's preliminary processing of the applications for the orders, there is no cause to apply the "fruit of the poisonous tree" doctrine to suppress the results of any court approved searches that were not independently invalid. The affidavit for the second wire interception order (the application for which was personally approved by the Attorney General) and the affidavits for the pen register extension search warrants contained sufficient information to support the determination of probable cause, even if references to facts developed under invalid wire interceptions



must be excised. Thus, these orders were not in fact the "fruit" of any invalid interceptions.

#### ARGUMENT

Title III of the Organized Crime Control and Safe Streets Act of 1968 is a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46. It was enacted after this Court in 1967 had suggested in *Berger v. New York*, 388 U.S. 41, and *Katz v. United States*, 389 U.S. 347, that, while electronic surveillance is covered by Fourth Amendment principles requiring probable cause and warrants for searches and seizures, it would be possible to construct a statutory system for advance judicial review and approval of proposed electronic surveillance that would satisfy the Amendment.

The protective provisions that were the focus of the Court's concern were those traditionally associated with the Warrant Clause of the Fourth Amendment—a requirement of prior judicial screening, determination by a neutral magistrate of the existence of probable cause, and particularity in the description of the "place" to be "searched" and the kinds of conversations to be "seized. The Court also indicated the need for time limitations on the duration of the search, including provisions for prompt termination of the surveillance once the conversations sought are seized and for a report to the approving court in the nature of an inventory or return. See *Berger v. New York*, *supra*, 388 U.S. at 58-60. Significantly for present purposes, the Court in no way intimated that the

identity or level of importance of the prosecuting official who initiated the process had anything to do with the constitutional interests at stake. The Warrant Clause of the Fourth Amendment supports no such idea.

Congress responded, using the *Berger* and *Katz* opinions as authoritative guidelines, by drafting Title III of the 1968 Act. As enacted, Section 2511 of Title III makes it a crime to intercept or disclose any oral or wire communication "[e]xcept as otherwise specifically provided." Section 2516 provides that federal and state prosecutors may authorize applications to federal and state courts for issuance of wire interception orders in designated categories of investigations. Section 2518 establishes the showings that must be made in such applications, lists the determinations the court must make before it may approve an electronic surveillance, specifies the terms that the order must contain, and regulates the procedures to be followed in conducting and reporting on the surveillance.

Section 2511(e) prohibits the willful disclosure of the contents of any wire or oral communication by any person "knowing or having reason to know that the information was obtained through [an] interception" in violation of Title III. Section 2515 directs that neither the contents of any intercepted wire or oral communication nor any evidence derived therefrom may be received in evidence in any federal or state judicial or administrative proceeding "if [that] disclosure \* \* \* would be in violation" of Title III. Section 2517 permits investigators to disclose the fruits of the surveillance in the proper performance of their official duties, including testimony in court, if they

have obtained knowledge of the communications through "any means authorized" by Title III. And Section 2518(10) authorizes any "aggrieved person" in a judicial or official proceeding to move to suppress the contents of any intercepted conversation or evidence derived therefrom if the communication was "unlawfully intercepted," if the order of authorization or approval under which the interception occurred is "insufficient on its face," or if the "interception was not made in conformity with the order of authorization or approval."

The present case, one of a series of similar cases, is the first squarely presenting to this Court an issue involving the admissibility of evidence obtained from a wire interception conducted under a court order. The specific issue involved is a narrow one. In concluding that the interception order had to be treated as invalid, the courts below did not find any fault in the ultimate determination by the issuing judge that a warrant should issue. They found no defect in the determination of probable cause or in the finding of necessity for the use of this kind of investigatory technique. Nor did they point to any defect in any aspect of the issuing judge's supervision of the surveillance or in the conduct of the surveillance by the executing officers. In other words, the courts below found no deviation from any of the extensive statutory provisions that could be viewed as ingredients in a constitutionally sufficient process for conducting electronic surveillances as suggested by *Berger* and *Katz*.

Rather, the courts below found flaws in two preliminary steps taken within the Department of Justice

before the matter was even presented to the district court. The court of appeals ruled in effect that the first application must be treated as invalidly filed because it did not have proper approval within the Department of Justice—the personal authorization of the Attorney General, or an Assistant Attorney General specially designated by the Attorney General (Section 2516)—but had only the personal approval of the Executive Assistant to the Attorney General. On this basis, the court of appeals concluded that the statute required suppression not only of evidence derived from the original order, but also from the extension order, the application for which had been personally approved by the Attorney General.

The trial court had also found a second defect in the preliminary procedure; it found that the moving papers improperly identified Assistant Attorney General Will Wilson as the “officer authorizing the application” (Section 2518(1)(a)), and concluded that that mistake required suppression of the probative evidence resulting from the surveillance. The propriety of these rulings is now before this Court for review.<sup>20</sup>

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<sup>20</sup> Because of its disposition of the authorization question, the court of appeals did not consider it necessary to pass upon the misidentification issue on which the district court had relied in this case. In a later decision, however, the court below in *United States v. Bobo*, C.A. 4, No. 71-2077, decided April 23, 1973, ruled that where the Attorney General had personally approved the application, but the authorizations bore Assistant Attorney General Wilson's name, signed by a Deputy Assistant Attorney General, there has been “sufficient compliance with §§ 2516 and 2518 of the Act” (slip op. p. 29). Only the Court of Appeals for the Ninth Circuit has reached the contrary result on this issue. See *United States v. Chavez*, No. 72-1319,

I. SUPPRESSION OF EVIDENCE IS NOT A PROPER OR USEFUL  
REMEDY IN THIS CASE FOR CORRECTING ALLEGED ERRORS  
IN PAST INTERNAL PROCEDURES OF THE DEPARTMENT  
OF JUSTICE

The judgment below should be reversed even should we assume, solely for the sake of argument, that the procedures followed within the Department of Justice from early 1969 to early 1972 in authorizing and submitting wire interception applications to federal courts did not adequately track the procedures indicated by Title III.

Suppression of evidence is a drastic remedy. Its use is justified when a constitutional right of a defendant has been violated, when admission of the evidence is likely to impair the accuracy of the fact-finding process, or when it is the only means of deterring police or prosecutorial misconduct. None of these conditions obtains here. The provisions of Title III designed to preserve defendants' Fourth Amendment rights were scrupulously complied with. The reliability of the evidence is not at issue so there is no question of impairing the accuracy of the trial's outcome. There is no need to deter prosecutorial action of this type in

certiorari granted, May 21, 1973. Despite the intervening ruling in the government's favor by the court below on this issue in another case, we believe the identification issue is properly raised in the present case for final and authoritative decision by this Court. The question is fairly comprehended by the question presented in the certiorari petition (see Rule 23(1)(c)) and was specifically discussed in the petition (Pet. 11, n. 8). Since the court below has already expressed itself on the question (although in an intervening case) and since the question is of considerable national importance, we brief it for decision in this case along with the authorization issue.

the future because the questioned practices have been revised so that there is no doubt of their compliance with Title III.

There is, under such circumstances, no occasion to suppress the evidence in this case. If the courts below wished to guard against some future reversion to the now-abandoned practices, they should, at most, have announced a policy of suppression for the future. That would be wholly adequate deterrence and would not frustrate, without ascertainable purpose, the legitimate public interest, in this and scores of other cases, in effective criminal justice.

**A. TITLE III'S SAFEGUARDS FOR THE INDIVIDUAL'S FOURTH AMENDMENT RIGHT OF PRIVACY WERE SCRUPULOUSLY OBSERVED**

Title III contains provisions incorporating the requirements of the Fourth Amendment as enunciated by this Court. These provisions, which protect the individual's right of privacy, relate to the district judge's determination of probable cause, his finding of necessity for the use of wire interception, and the terms of the order he enters. There is no claim here, nor could there be, that these Fourth Amendment provisions were not complied with completely.

The provisions of Title III involved here do not incorporate Fourth Amendment concerns. They have to do, as will be shown, with Congress' desire to ensure uniformity of policy and political responsibility. These objectives, as we will show in Part II of this Brief, were in fact served by the procedures followed. But, for present purposes, we wish to stress that, whatever view one takes of the Department's compliance with



those provisions, the right-of-privacy provisions are not in issue here.

The distinction between the two types of provisions is, of course, apparent from the fact that the former group derives directly from this Court's opinions in *Berger* and *Katz* while the latter finds no counterpart there. But it is also plain that Congress intended this distinction. It was recognized, for instance, in the congressional findings concerning this legislation. See Section 801(d), Public Law 90-351, 82 Stat. 211.

To safeguard the privacy of innocent persons, the interception of wire or oral communications \* \* \* should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court.

Congress made no comparable finding that the preliminary authorization of a particular prosecuting official was designed to "safeguard the privacy of innocent persons."

Further recognition that the authorizing court is the safeguard for privacy is found in the wording of the statute. Under Section 2518(3), before the court may issue an order authorizing an electronic surveillance, it must find on the basis of facts presented by the applicant that: (a) probable cause exists to believe that an individual is committing or is about to commit a particular enumerated offense; (b) probable cause exists to believe that particular communications about that offense will be obtained; (c) normal investigative procedures have failed, appear unlikely to succeed, or are too dangerous; and (d) probable cause exists to

believe that the facilities to be intercepted are used in connection with the offense or are listed in the name of or used by the individual involved.

As an extra safeguard, Congress vested the power to issue these federal wire interception orders—not with magistrates, as in the case of a normal search warrant under Rule 41(a), Fed. R. Crim. P.—but in the exclusive control of judges of the United States district courts and courts of appeals. 18 U.S.C. 2510(9)(a) and 2516(1). Under Section 2518(6), the federal judge may maintain direct control during the course of the interception by requiring reports at any interval deemed necessary. Upon completion of the interception, the fruits of the search are immediately placed under judicial control, 18 U.S.C. 2518(8), and release of the information and notification are also controlled by the judge (Section 2518(8)(d), (9) and (10)).

Thus, the structure of Title III places not only the responsibility for protecting the individual's right of privacy in the informed judgment and discretion of the federal courts but also gives the courts ample power to perform that crucial function independently of the discretion of prosecuting authorities to seek court authorization for electronic surveillance. This is hardly surprising, since Title III was designed to comply with the constitutional requirements set forth in *Berger* and *Katz*, which include the need to interpose the impartial judgment of the court between the citizen and the prosecution in order to safeguard the



privacy of individuals against arbitrary invasions by government officials.<sup>21</sup>

The provisions of Title III designed to preserve respondents' Fourth Amendment rights were fully complied with in this case. The district court, upon a complete showing by the government, made the findings required for the protection of those rights, and neither of the courts held to the contrary. Nor does any one claim that admission of the evidence in question would in any way impair the fact-finding process. There is here no question of convicting the innocent.

**B. THE SUPPRESSION PROVISIONS OF TITLE III CODIFY EXISTING LAW AND DO NOT APPLY TO THE PROVISIONS CONCERNING THE INTERNAL PROCEDURES OF THE DEPARTMENT OF JUSTICE**

The court below, and several other courts that have reached the same result, concluded that Title III itself requires the suppression of any evidence derived from interceptions after defective processing within the Department of Justice.<sup>22</sup> This conclusion, however, necessarily overlooks or misinterprets the thrust of the rele-

<sup>21</sup> As this Court said in *Coolidge v. New Hampshire*, 403 U.S. 443, 450, in finding invalid a warrant issued upon a determination of probable cause by a state Attorney General, its chief government enforcement agent:

"[P]rosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise' that must rightly engage their single-minded attention."

<sup>22</sup> In addition to the Fourth Circuit's decision below, the Seventh Circuit, Ninth Circuit, and the District of Columbia Circuit have ruled that authorizations by the Attorney General's Executive Assistant are invalid and require suppression of any evidence obtained under any resulting court orders. See, e.g., *United States v. Roberts, et al.* (C.A. 7), pending on peti-

vant provisions of the Act. When these are read as a coherent whole, rather than as in contradiction with one another, it becomes apparent that the statute orders suppression as the remedy for violations of Fourth Amendment rights and hence does not provide suppression as a remedy for defective processing of applications to courts.

The court of appeals relied upon Section 2515 of 18 U.S.C. which states:

Whenever any wire or oral communication has been intercepted, no part of the contents of

tion for certiorari, No. 72-1475; *United States v. King* (C.A. 9), pending on petition for certiorari, No. 72-1320; and *United States v. Mantello, et al.* (C.A.D.C.), pending on petition for certiorari, No. 72-1476.

The Second Circuit, speaking through Chief Judge Friendly, has held that such authorizations comply with the Act and would in any event not justify suppression. See, *e.g.*, *United States v. Pisacano*, 459 F. 2d 259, pending on petition for certiorari, No. 71-1410; *United States v. Becker*, 461 F. 2d 230, pending on petition for certiorari, No. 72-158.

Only the Ninth Circuit has held that the inaccurate indication that Assistant Attorney General Wilson was the authorizing officer constitutes a violation of the Act requiring suppression, *United States v. Chavez*, No. 72-1319, certiorari granted, May 21, 1973. The Second, Third, Fourth, Seventh, Eighth, and District of Columbia Circuits have ruled that suppression is not justified on that ground. See, *e.g.*, *United States v. Wright*, 466 F. 2d 1256 (C.A. 2), pending on petition for certiorari, No. 72-5665; *United States v. Cafero* (C.A. 3), pending on petition for certiorari, No. 72-1304; *United States v. Bobo*, C.A. 4, No. 17-2077, decided April 23, 1973; *United States v. Posner* (C.A. 7), pending on petition for certiorari, No. 72-1484; *United States v. Cox*, 462 F. 2d 1293 (C.A. 8), pending on petition for certiorari, No. 72-5278; *United States v. Mantello* (C.A.D.C.), *supra*.

The First, Fifth, Sixth, and Tenth Circuits have not finally ruled on these questions yet. But see *United States v. Robinson*, 468 F. 2d 189, and *id.* 472 F. 2d 973 (C.A. 5).

such communication and no evidence derived therefrom may be received in evidence in any trial \* \* \* before any court \* \* \* if the disclosure of that information would be in violation of this chapter.

The court of appeals correctly stated that this general statement is implemented by Section 2518(10) (a), which provides that any "aggrieved person" in a trial may move to suppress the fruits of an interception on any one of three defined grounds:

(i) the communication was unlawfully intercepted;  
 (ii) the order of authorization or approval under which it was intercepted is insufficient on its face;  
 or

(iii) the interception was not made in conformity with the order of authorization or approval.<sup>23</sup>

The court of appeals decided that suppression in this case was required under both (i) and (ii) (Pet. App. 18a-19a), but basic principles of statutory construction demonstrate the error of that conclusion. Unlawful interception justifying suppression under (i) cannot be any failure to comply with any provision of Title III. If the provision were read that way, the grounds for suppression specified in (ii) and (iii) would be wholly unnecessary surplusage, since Title III also dictates what the order must contain (Section 2518(4)) and the entire Act is drawn on the assumption that wire interception is unlawful unless in

<sup>23</sup> Since Section 2518(10)(a) provides that if the suppression motion is granted, the evidence "shall be treated as having been obtained in violation of this statute," it is evident that Section 2518(10)(a) is the method provided for implementing Section 2515. See S. Rep. No. 1097, 90th Cong., 2d Sess., p. 106.

compliance with a court order. If (ii) and (iii) are to be given any meaning, therefore, (i) must not be interpreted to require suppression whenever there is any deviation from any provision whatever of Title III. That would have been an easy statute to draft. It is not the statute Congress enacted. A narrower definition of unlawful interception is required.

The correct reading of the suppression provision, indicated both by textual analysis and legislative history, is that the first ground for suppression—unlawful interception—refers to interceptions made without the authorization of a court order based upon a sufficient showing of probable cause. The other two grounds refer to situations in which an order has issued but is either insufficient on its face or has not been complied with. The fact is that internal procedures within the Department of Justice were not intended to be grounds for suppression.<sup>24</sup>

This reading of Section 2518(10)(a)(i) also accords with common usage. Congress would not normally say that a "communication was unlawfully intercepted" in referring to any procedural defect in

<sup>24</sup> In its findings, Congress stated its intent "to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts \* \* \*," Section 801 (b), P.L. 90-351. It further made clear that "unauthorized" interceptions were those which had not been "authorized by a court of competent jurisdiction," Section 801(d), P.L. 90-351.

Similarly, Rule 41, F.R. Crim. P., before its amendment in 1972, listed five grounds for the suppression of seized evidence, the first of which was that "the property was illegally seized without a warrant," and the fourth was lack of probable cause to support the warrant. The other grounds went to the validity of the warrant and its execution, in a manner generally similar to 18 U.S.C. 2518(10)(a).

processing the matter, no matter how slight, at a time before a valid court order based on an adequate showing of probable cause had been obtained or any "communication" "intercepted."

The court of appeals' attempt to apply Section 2518 (10) (a) (ii) is no more appropriate because the order here was patently not "insufficient on its face." The court reasoned, "If the order had failed to identify the person who authorized the application, it would have been insufficient on its face, requiring suppression of the evidence. Here, however, there was no authorization at all, which is the equivalent of failing to identify anyone." (Pet. App. 19a). The first sentence may, for purposes of this argument, be taken as true; the second attaches an impossible meaning to the provision in question. The court's argument appears to be that an order is insufficient "on its face" if a defect can be discovered by looking behind its face. By that reasoning, any court order is "insufficient on its face" if, after a hearing upon underlying evidence, it develops that any part of Title III has not been complied with. That is not what "on its face" means in any context of the law.<sup>25</sup>

The court of appeals' reading of the grounds for suppression would have yet another improbable result.

<sup>25</sup> Since the orders were valid on their face, the persons to whom they were directed were justified in acting in reliance upon them, without looking behind them to determine their actual validity. Section 2518(10) (a) (ii) permits this reliance as written. If suppression is ordered in "similar" situations (Pet. App. 77a), and orders valid on their face are to be struck down because of underlying deficiencies, such reliance is no longer possible.

As noted, Section 2518(10)(a), which provides three specific grounds for suppression, implements the general language of Section 2515, which ties the propriety of suppression of evidence to the impropriety of its "disclosure." Section 2511(1)(c) subjects any person who willfully discloses the contents of any wire communication, knowing or having reason to know that the information was obtained through a violation of the subsection, to substantial criminal penalties. The consequence would be to expose law officers who had committed the most insubstantial and technical breaches of Title III's procedures to a fine of up to \$10,000 or imprisonment of up to five years, or both. Congress surely did not intend the availability of severe criminal penalties for every defect in processing applications.

If we follow the interpretation of Section 2518(10)(a) suggested by its text, its legislative history, common usage, and its relation to other provisions of Title III, we must conclude, therefore, that Congress intended to suppress evidence obtained in violation of Fourth Amendment rights and to provide penalties for those who knowingly committed those violations or made more harmful their results by disclosing the information. Hence, suppression is keyed to (1) wire interceptions without a court order based on adequate probable cause, (2) wire interceptions pursuant to an obviously ("on its face") insufficient order, or (3) wire interceptions not authorized by the order. Not one of these categories applies to the wire interceptions in this case.

This natural reading of the statutory grounds for

suppression also makes it clear that Congress was attempting to follow the existing rules of suppression of evidence, not to legislate a dramatic expansion of the suppression remedy. This conclusion is directly supported by the Senate Report (S. Rep. No. 1097, 90th Cong., 2d Sess., p. 106), which states that section 2518(10)(a) "provides the remedy for the right created by section 2515." As to the latter provision the Report states (*id.* at 96).

The provision [section 2515] must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United States*, 302 U.S. 379 (1937) or indirectly obtained in violation of the chapter (*Nardone v. United States*, 308 U.S. 338 (1939)). There is, however, no intention to change the attenuation rule. See *Nardone v. United States*, 127 F. 2d 521 (2d), cert. denied, 316 U.S. 698 (1942). *Wong Sun v. United States*, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law. See *Walder v. United States*, 347 U.S. 62 (1964).

This report thus reflects an overall intent to follow existing search and seizure law. It incorporates the existing limits on the suppression doctrine and is not applicable where the judicial exclusionary rule would not apply.<sup>26</sup> We turn therefore to a consideration of the scope of that rule.

<sup>26</sup> See *Alderman v. United States*, 394 U.S. 165, 175 n. 9. The fact that Congress did not intend to expand the exclusionary rule is also reflected in Title II of the same statute.



C. THERE WAS NO INFRINGEMENT OF ANY SUBSTANTIAL RIGHT OF  
THESE DEFENDANTS WARRANTING APPLICATION OF THE JUDI-  
CIALLY CREATED EXCLUSIONARY RULE

The exclusionary rule was established to remedy violations of constitutional rights, and was subsequently extended to certain statutory violations under the supervisory power of this Court. But this Court has emphasized that this remedy must be sparingly utilized: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." *Nardone v. United States*, 308 U.S. 338, 340.<sup>27</sup>

The Court has generally held that the infringement of some substantial constitutional right of the defendant merits the exclusion of the evidence improperly seized from him, though even this assumption has been challenged recently. See *Bivens v. Six Unknown Agents*, 403 U.S. 388, 411 (Burger, C.J., dissenting); *Schneekloth v. Bustamonte*, No. 71-732, decided May

18 U.S.C. 3501-3502, dealing with the admissibility of confessions and eyewitness testimony. There Congress specifically limited the exclusion of otherwise valid evidence to constitutionally mandated situations. It would be anomalous to conclude that Congress specifically limited the exclusionary rule in Title II while moving in the opposite direction by expanding the traditional rule in Title III.

<sup>27</sup> Compare *State v. Bisaccia*, 279 A. 2d 675, 767-768 (N.J.): " \* \* a judge would be short in realism if he did not understand that the evidence he is asked to suppress is evidence of guilt and that the judgment of not guilty which will ensue will likely be false. To justify so serious an insult to the judicial process, some compensating gain should be incontestable."

Cf. *Lego v. Twomey*, 404 U.S. 477.



29, 1973 (Powell, J., concurring). The violation of constitutional mandates, and the vindication of fundamental personal rights thereby infringed, may be sufficient reason for the application of the exclusionary rule, at least where there is no alternate remedy. If there has been an unreasonable search and seizure or an involuntary confession, there is usually no occasion to consider whether substantial rights have been ignored. See, e.g., *Weeks v. United States*, 232 U.S. 383; *McNabb v. United States* 318 U.S. 332, 341.<sup>28</sup>

But statutory violations may or may not involve substantial rights and there may not be an "overriding public policy" meriting suppression. Our analysis of the cases discloses that this Court has concluded that a statutory violation warrants suppression only when the violation adversely affects rights of the defendant which are of constitutional, or near constitutional, magnitude.<sup>29</sup> Only in such cases, has this

<sup>28</sup> But see the government's brief in *United States v. Robinson*, No. 72-936, pending on certiorari.

<sup>29</sup> The American Law Institute has proposed that the application of the Exclusionary Rule be determined by the substantiality of the infringement involved. The Institute's Model Code of Prearrest Procedure (Official Draft No. 1, July 15, 1972) would authorize suppression of evidence "only if the court finds that the violation upon which it [the motion] is based was substantial \* \* \*." (Section 290.2(2)). Among the circumstances bearing on substantiality, the Code suggests, "(a) the importance of the particular interest violated; (b) the extent of deviation from lawful conduct; (c) the extent to which the violation was willful; (d) the extent to which privacy was invaded; [and] (e) the extent to which exclusion will tend to prevent violations of this Code \* \* \*." (*ibid.*).

See also American Bar Association Project on Minimum Standards for Criminal Justice, *Electronic Surveillance* (Tentative Draft), §2.3(d), which provided that "[a]n error not affecting substantial rights in an application, [or] author-

Court implicitly found in an "overriding public policy" warranting suppression.<sup>30</sup>

We have found no case where this Court has exercised its supervisory powers and suppressed evidence where such substantial rights were unaffected by the violation complained of. Suppression where no such

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ization \* \* \* should not be grounds for suppression \* \* \*." In the approved draft, this section was deleted only on the grounds that "these matters are best handled on a case-by-case basis and need not be stated in the text of the standards themselves." See American Bar Association Project on Minimum Standards for Criminal Justice, *Electronic Surveillance* (Approved Draft, March 1971), Supplement at 10.

<sup>30</sup> The cases fall into two general categories, those related to Fourth Amendment rights of privacy and those relating to Fifth and Sixth Amendment interests against involuntary incrimination. An example of the first category is *Nardone v. United States*, 302 U.S. 379. There, Section 605 of the Communications Act of 1934 made it a crime for "any person" to intercept and divulge any intercepted communication, and a federal officer had violated that statute by tapping telephone wires without a warrant. This violation, it was held in the second *Nardone* case, *Nardone v. United States*, 308 U.S. 338, 340, required suppression since: "[T]he logically relevant proof which Congress has outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.'"

Substantial personal rights of the defendant were clearly affected by the violation. Indeed, thereafter, in *Katz v. United States*, 389 U.S. 347, this Court ruled that wiretapping without a search warrant violated the Fourth Amendment.

Another example of this category of violation has arisen under a different statute, 18 U.S.C. 3109, which permits an officer to break open an outer door of a house in the execution of a search warrant only if "after notice of his authority and purpose" he is refused admittance. That statute expresses "the reverence of the law for the individual's right of privacy in his house." *Miller v. United States*, 357 U.S. 301, 313. As this Court has said in *Sabbath v. United States*, 391 U.S. 585, 589, its provisions are "designed to incorporate fundamental

rights are at stake would be an unwarranted expansion of the exclusionary rule and would conflict with general congressional policy that the courts render judgments "without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111; Rule 52(a), Fed. R. Crim. P.; *Chapman v. California*, 386 U.S. 18, 23-24.

We have shown that the provisions of Title III designed to safeguard defendants' Fourth Amendment rights were fully complied with through the findings of the issuing judge. The statutory requirements at issue here—authorization of the application and the identification of the authorizing officer—are not Fourth Amendment requirements. These procedural provisions have no substantial bearing on the defendants' personal rights. Any departure from the prescribed procedures in the administrative review of the proposed applications could not possibly have tainted

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values \* \* \*." Again, when the command of the statute is disregarded, substantial rights of a defendant are directly violated.

The second category, reflecting Fifth and Sixth Amendment values, is illustrated by *McNabb v. United States*, 318 U.S. 332, and *Mallory v. United States*, 354 U.S. 449. In these cases, this Court held that a violation of a Federal Rule of Criminal Procedure, requiring that an arrested person be taken promptly before a magistrate, warrants suppression of the evidence. There the procedural requirement was found to warrant suppression because it "checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime." *McNabb*, *supra*, 318 U.S. at 344. There was subsequent recognition of the near constitutional magnitude of the violation in *Miranda v. Arizona*, 384 U.S. 436.

the district court's basic findings of probable cause and necessity.

On the contrary, for reasons that we shall amplify in Part II of this brief, the intra-Departmental procedures outlined by Title III were adopted for reasons unrelated to the rights of individual citizens—basically to assure centralization and close control of policy decisions and political accountability for those policies—and thus suppression would be inappropriate and unnecessary to protect the rights of individuals. Any failure in the Department's preliminary screening of the applications becomes irrelevant so far as the defendants are concerned. Such a failure could, at most, result in submission of some applications to the judge which would not otherwise have been filed, or perhaps, in the withholding of some applications that would otherwise have been filed.

There was a comprehensive screening procedure within the Department, including review of the field attorney's proposed application by a special unit in the Organized Crime Section, review by the Deputy Chief or Chief of the Organized Crime Section, review by a Deputy Assistant Attorney General and review by the Attorney General's own Executive Assistant. No application was forwarded to the next level for review unless it was approved below.<sup>31</sup> It was the same screening procedure the Department followed in all of these cases. See President's Commission on Law

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<sup>31</sup> The success of the Department's screening procedure is evidenced by the fact that of the 500 federal wiretap applications submitted through 1971, only one was denied by a federal judge and there have been no successful challenges to federal wire interception orders because of insufficient probable cause.

Enforcement and Administration of Justice, *Task Force Report, Organized Crime*, Appendix C at 103; Tiffany, McIntyre, Rotenberg, *Detection of Crime* (1967) at 119; American Bar Association Project on Minimum Standards for Criminal Justice, *Electronic Surveillance* (Tentative Draft), at 132-133.

Finally, in the instant case, the application for the wire interception order of October 16, approved by Mr. Lindenbaum, contained an affidavit showing facts which make it clear beyond any reasonable doubt that Attorney General Mitchell would have personally authorized the application had he been available.<sup>32</sup>

Indeed, on November 6, 1970, the Attorney General personally authorized an application for an extension of the original order, which recited details of the earlier application. In our view, this approval of the extension constituted a ratification of the authorization of October 16. It made him responsible under Section 2516 for both applications and removed any basis for suppression of the fruits of the earlier application.

No matter what view one takes of the authority of the Attorney General's Executive Assistant to approve the original application on behalf of the Attorney General, that approval resulted in no violation of defendants' rights justifying suppression of evidence.<sup>33</sup>

<sup>32</sup> The affidavit showed that arrangements for a narcotics transaction had been made on this particular phone and had been overheard by federal agents with the permission of the purchaser. The affidavit further showed the sale of  $\frac{1}{8}$  kilo of exceptionally pure heroin by Giordano, indicating that he was very close to the original source of the drug.

<sup>33</sup> Cf. *Sullivan v. United States*, 348 U.S. 170, 174, holding that a United States Attorney who presented evidence to a grand jury in violation of a Justice Department directive would

Similarly, the fact that the memoranda notifying the field attorneys erroneously suggested that approval for the submission of the application was the judgment of Assistant Attorney General Wilson is not ground for suppression. There was no wilful or deliberate misrepresentation or concealment; rather, the form memorandum simply tracked the language of the statute. Although it implied that the operative judgment was that of the Assistant Attorney General, the memorandum placed the Attorney General on record as having been involved in the matter by designating the Assistant Attorney General to Act "in this proceeding." There is no reason to think that the federal judge would have acted any differently in authorizing the interception if the papers had stated that the application had actually been approved, not by an Assistant Attorney General, but by the Attorney General himself or by his Executive Assistant. Compare *Coolidge v. New Hampshire*, 403 U.S. 443, 449-453. Thus, the identification issue cannot realistically have had any substantial bearing on the personal rights of an individual criminal defendant.

D. IT IS PARTICULARLY INAPPROPRIATE TO SUPPRESS EVIDENCE IN THIS CASE SINCE THE CHALLENGED PROCEDURES HAVE BEEN REVISED, NO DETERRENT EFFECT WOULD BE SERVED, AND SUPPRESSION WOULD UNDERMINE A LARGE NUMBER OF IMPORTANT CRIMINAL CASES

There are still other considerations that show that suppression is not justified in cases like this one. The Department of Justice changed the procedures under  
 be "answerable to the Department, but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence."



attack more than a year ago and will not revive them; thus there is no need for "deterrence" against resort to similar procedures. In addition, suppression would seriously adversely affect the administration of justice by requiring the exclusion of probative evidence—frequently the basic evidence—in a very large number of criminal cases.

The principal justification given by this Court for the exclusionary rule is that the suppression of evidence is the only effective way to deter the improper conduct in question. See *Terry v. Ohio*, 392 U.S. 1, 12; *Mapp v. Ohio*, 367 U.S. 643, 655; *Linkletter v. Walker*, 381 U.S. 618, 636. See also the concurring opinion of Mr. Justice Powell in *Schneekloth v. Bustamonte*, No. 71-732, decided May 29, 1973, slip op. 19, n. 25. But following the decision in *United States v. Robinson*, 468 F. 2d 189 (C.A. 5), the Department of Justice revised its procedure toward the end of 1971 to comply with that decision. Subsequently, in late March, 1972, after the district court opinion in the instant case raised the identification issue, the form documents concerning authorization of the application were also revised. No application for a wire interception order is now filed without the personal authorization of the Attorney General, and the applications and orders now explicitly reflect his personal determination. Thus, suppression of the evidence here is not required to force a change of practice.

Nor is there any reason to conclude that suppression is necessary to deter the Department of Justice from reverting to the practice in the future. Obviously,

regardless of whether this Court indicates that personal authorization by the Attorney General or a designated Assistant Attorney General is necessary for a valid wiretap, the Department of Justice would not jeopardize its future prosecutions by re-instituting procedures that are even questionable.<sup>34</sup> This is particularly true where, as here, the procedures were matters of happenstance and were not designed to, and did not, achieve any result that cannot be achieved under the new procedures.

In exercising its power to determine whether to impose the sanction of exclusion of evidence in this case—assuming *arguendo* what we dispute in Part II, that there were procedural violations of the Act—the Court should draw upon the factors illuminated in its retroactivity decisions. The Court held in *Linkletter v. Walker*, 381 U.S. 618, that it has the power to decide whether rulings of even constitutional dimension should be applied retroactively—there, whether the Fourth Amendment exclusionary rule should be applied to prior illegal searches and seizures conducted by state authorities. In *Stovall v. Denno*, 388 U.S. 293, 297, the Court listed what have become the controlling criteria in making this judgment:

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<sup>34</sup> There is precedent for giving effect to a change of practice. For example, the First Circuit in *United States v. Butera*, 420 F. 2d 564, a case involving underrepresentation of women in jury selection, found there was no need to exercise its supervisory power since Congress had perceived imperfections and changed the procedure for selecting juries. Here, we submit, the revision by the Department of Justice of its procedure likewise obviates the need for this Court to suppress evidence under its supervisory power.



\* \* \* (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

There have been two major Fourth Amendment rulings in which the retroactivity question has arisen: the first was in *Linkletter*, where the Court held that the application of the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643, need not be enforced retroactively, and the second was in *Desist v. United States*, 394 U.S. 244, where it was held that the decision in *Katz v. United States*, *supra*, 389 U.S. 347 (that non-trespassory electronic surveillance—such as that involved in the present case—is subject to the Fourth Amendment), should apply only to surveillances conducted after the date of the decision. In a third, related case, the Court held in *Fuller v. Alaska*, 393 U.S. 80, that there should be no retroactive application of the decision (*Lee v. Florida*, 392 U.S. 378) to require exclusion from state trials of evidence of communications illegally intercepted in violation of Section 605 of the Federal Communications Act, 47 U.S.C. 605. Similar considerations apply even more strongly to the parallel, non-constitutional issues now before the Court under Title III's statutory procedures.

First, as we have suggested above and discuss in greater detail below, the primary purpose of the authorization and identification procedures here at issue is not the protection of the individual's right to privacy. Thus, even a holding that the final authorization

procedures were violated would not imply that any defendant's personal rights were invaded or that any violation could be redressed by exclusion of evidence.

To the extent that it could be argued that individual privacy was somehow implicated by the administrative processing of the applications, it is undeniable that, just as in *Linkletter*, *Desist*, and *Fuller*, any intrusion on the individual's privacy has already occurred and exclusion of evidence is not a pertinent response. Similarly, no deterrent objective would be served by application of a stringent interpretation of Title III's preliminary procedures to applications submitted years ago, under a system that was long ago revised.

There was, of course, considerable reliance by law enforcement authorities on the former procedures. All of the applications submitted from 1969 through early 1972—approximately 525—would be subject to the challenge that Assistant Attorney General Will Wilson was incorrectly identified as the authorizing officer. Our survey indicates that these interceptions are involved in 159 criminal cases pending either in this Court or lower federal courts, and that these cases name 1,433 defendants. Virtually all of the cases are under the supervision of the Organized Crime Section of the Criminal Division. We are advised that few if any of these cases could be successfully prosecuted if the fruits of the otherwise valid wire interceptions, which produced undeniably accurate, probative, and reliable evidence, had to be suppressed.

Among these pending cases are some 60 prosecutions in which the Attorney General's Executive Assistant

acted on his behalf in approving the submission of one or more wire interception applications to a federal judge; our calculations indicate that there are 626 defendants named in these cases, involving narcotics trafficking, gambling syndicates, and loan sharking. The impact on the administration of criminal justice of a decision suppressing evidence on either or both of these procedural issues would be disastrous. Indeed, it would cause a sharp setback to the government's efforts to combat organized crime, an objective the 1968 Organized Crime Control Act in general and Title III in particular were intended by Congress to aid.

In this context, we submit, where the advancement or vindication of any personal right to privacy would be illusory, and where the destruction of otherwise fair and important criminal prosecutions would be massive, there is simply no "overriding public policy" <sup>35</sup> justifying the suppression of evidence, as the court below has ordered. If a rule of exclusion were to be framed for procedural deviations of the sort involved here, it should be framed to apply only to future wire interception applications. For this reason alone, the judgment below should be reversed.

## II. THE PROCEDURES FOLLOWED IN THIS CASE COMPLIED WITH THE REQUIREMENTS OF TITLE III

Should the Court conclude that it is necessary to consider the merits of the defendants' challenges to the procedures followed within the Department of Justice in deciding to submit the applications for wire interception orders, the result should be the

<sup>35</sup> *Nardone v. United States*, *supra*, 308 U.S. at 340.

same—reversal of the suppression orders—because the procedures complied with the provisions and policy objectives of Title III.

A. THE STATUTORY REQUIREMENT THAT WIRETAP APPLICATIONS BE AUTHORIZED BY THE ATTORNEY GENERAL OR A DESIGNATED ASSISTANT ATTORNEY GENERAL WAS DESIGNED TO CENTRALIZE RESPONSIBILITY FOR POLICY IN THESE OFFICIALS AND WAS NOT INTENDED TO COMPEL PERSONAL ACTION BY THEM ON EACH APPLICATION

Congress could have enacted a statute, paralleling the search warrant provisions of Rule 41, Fed. R. Crim. P., under which any federal or state law enforcement official could have applied to a court for an electronic surveillance warrant. The courts below, and certain others, have focused on the fact that Title III follows a somewhat different approach, and calls for the involvement of high prosecuting officials, not just field investigators, in the decision-making process. But the crucial fact about this legislative plan that these courts have ignored is the *purpose* of the system designed by Congress. That purpose was the centralization of policy, coupled with political accountability for the policy, and was satisfied here even though the Attorney General did not personally review one of the wire interception applications at issue.

Under a statute that simply said that the "Attorney General may authorize" the filing of an application for a wire interception order, it would have been unlikely that any court would have concluded that the Attorney General had to act personally on each interception; instead the sensible conclusion would have

been that the function of the Attorney General was to set policy.<sup>36</sup>

The statute involved in this case, Section 2516(1), provides instead that the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for \* \* \* an order authorizing \* \* \* the interception of wire or

<sup>36</sup> 18 U.S.C. 2514, also part of Title III, establishes a procedure for granting immunity to witnesses. This section provides that the "United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify \* \* \*." It has been held that this function of the Attorney General was validly delegated to an Assistant Attorney General. *December 1968 Grand Jury v. United States*, 420 F. 2d 1201 (C.A. 7), certiorari denied *sub nom. Di Domenico v. United States*, 397 U.S. 1021; *United States v. Puntillo*, 440 F. 2d 540, 544 (C.A. 7); *United States v. Di Mauro*, 441 F. 2d 428, 438-439 (C.A. 8). In *Di Mauro* the court pointed out: "Indeed, it could just as well be argued that in view of the narrower scope of his responsibility, the Assistant Attorney General in charge of the Criminal Division could give more careful consideration to these applications than could the Attorney General whose duties are more far ranging." 441 F. 2d at 439.

In *Jay v. Boyd*, 351 U.S. 345, 351, n. 8, this Court construed 8 U.S.C. 1254, which provides that the Attorney General "may in his discretion" suspend deportation of any deportable alien who meets certain statutory requirements. It said: "Petitioner does not suggest, nor can we conclude, that Congress expected the Attorney General to exercise his discretion in suspension cases personally. There is no doubt but that the discretion was conferred upon him as an administrator in his capacity as such, and that under his rulemaking authority, as a matter of administrative convenience, he could delegate his authority to special inquiry officers with review by the Board of Immigration Appeals." See also *Kleindienst v. Mandel*, 408 U.S. 753, 759.

oral communication." It is this wording, listing not only the Attorney General but also any specially designated Assistant Attorney General, that played a central part in the conclusion of the court below that personal authorization of each individual application by the Attorney General or by a specially designated Assistant Attorney General was required. But that conclusion does not necessarily follow. It is just as reasonable, and more consistent with known practices of delegation within the government, to read the provisions as requiring handling within the specified offices under the supervision of the specified officers. An examination of the legislative history and other provisions of this statute shows, moreover, that Congress did not intend so drastic a change in customary practice as to require personal action on each application. The purpose of this section is simply to fix responsibility for the policy decision under which the electronic surveillance is sought.

The Senate explained Section 2516(1) as follows (S. Rep. No. 1097, 90th Cong., 2d Sess., p. 97):

\* \* \* This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen.<sup>37</sup>

<sup>37</sup> See also the remarks of Senator McClellan, the sponsor of the bill in the Senate. 114 Cong. Rec. 11231, 14469.

The section provides for the "formulation of law enforcement policy" by "a publicly responsible official" and it makes "the lines of responsibility lead to an identifiable person" in the event of abuses. These statements do not suggest personal action in every wire interception case. Rather, they indicate that the Attorney General or his specially designated Assistant Attorney General are to establish basic guidelines and to retain the ultimate responsibility for their compliance, permitting their subordinates to act under their direction and pursuant to their policies in particular cases.<sup>38</sup> The section excludes policy formulations by the many United States Attorneys throughout the country, or by persons in other federal departments whose agents might be empowered to conduct surveillances under the statute,<sup>39</sup> avoiding the "possibility that divergent practices might develop" in different judicial districts and in different agencies.

Section 2516(1), moreover, must be considered together with Section 2516(2), the companion section applicable to state investigations. That section provides that the "principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof," if such attorney has authority under a state statute, may apply to a state

<sup>38</sup> Guidelines could have been developed by attempting to identify in advance situations in which a tap would be warranted; instead, the guidelines that actually evolved consisted of decisions made on previous applications, which served as precedents to guide Mr. Lindenbaum's actions in the cases in which he acted on behalf of the Attorney General.

<sup>39</sup> For example, agents of the Treasury Department investigating counterfeiting under 18 U.S.C. 471, 472 or 473. See 18 U.S.C. 2516(1) (d).

court judge for an interception order. In discussing that section, the Senate Report says (*id.* at 98):

Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State may authorize an application to a State judge of competent jurisdiction, as defined in section 2510(9), for an order authorizing the interception of wire or oral communications. *The issue of delegation by that officer would be a question of State law.* \* \* \* The intent of the proposed provision is to *provide for the centralization of policy* relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State. \* \* \* Where no such office exists, *policymaking* would not be possible on a statewide basis; \* \* \* The intent of the proposed provision is to *centralize areawide law enforcement policy* in him [Emphasis added].

This section indicates that the overriding congressional concern was with centralization of policy and not with the identity of the person who physically acts to apply that policy. It also indicates that Congress, by naming particular officials in both the federal and state sections, did not intend to foreclose delegation but intended the propriety of delegation to be determined under customary law in each respective prosecutorial area.<sup>40</sup> There is no reason to think the problems of federal and state delegation are not parallel, and the general propriety of delegations by the

<sup>40</sup> See *State v. Angel*, 261 So. 2d 198 (Fla. App.), affirmed, 270 So. 2d 715 (Fla.); but see *State v. Frink*, 13 Cr. L. 2115 (Minn.); *State v. Siegel*, 285 A. 2d 671 (Md.).



Attorney General to his Executive Assistant is shown by 28 C.F.R. § 0.6, set out at p. 10, *supra*, and by 28 U.S.C. 510, discussed at pp. 60-61, *infra*. Indeed, it is a most peculiar interpretation of the statute that supposes Congress to have intended the proliferation of delegations according to the varying laws of fifty states but to have balked at the notion of a delegation by the Attorney General of the United States to his Executive Assistant.

The same high prosecuting officials specified in Section 2516(1) and 2516(2) are again named in Section 2519(2) as the officials required to submit annual reports to the Administrative Office of the United States Courts concerning intercepted wire communications. It is unlikely that Congress intended that these high officials were to be required to fill out and submit such reports personally. Rather, we submit that Congress in this provision, as in Section 2516, realistically expected delegation by these officials, subject of course to their personal accountability for the accuracy and candor of the reports.

Finally, a comparison of the provisions of Section 2516 with those of 18 U.S.C. 245(a)(1) (the Civil Rights Act of 1968), enacted by the same Congress two months earlier, shows that Congress did not forbid delegation.<sup>41</sup> As Section 245(a)(1) shows, when

<sup>41</sup> 18 U.S.C. 245(a)(1) provides:

"\* \* \* No prosecution of any offense described in this section shall be undertaken by the United States except upon the *certification in writing of the Attorney General or the Deputy Attorney General* that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, *which function of certification may not be delegated*" [emphasis added].

Congress wished to require personal action as well as personal responsibility, it expressly stated that the function "may not be delegated." See, also, Section 505(e) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 355(e), which provides that the authority of the Secretary of Health, Education, and Welfare to suspend the approval of an application covering a new drug because of imminent hazard to the public health "shall not be delegated." Given the practice and law of delegation within the government, such provisions are essential when Congress wants personal action in every case. No such language is contained in the instant statute.

Despite the conclusion of the court below (Pet. App. 9a-10a), the fact that the particular language used in Section 2516(1) derived from a 1961 wire interception bill, S. 1495, 87th Cong., 1st Sess., does not point to a different conclusion.<sup>42</sup> As introduced, the 1961 bill provided in Section (4)(b) that the "Attorney General, or any officer of the Department of Justice, or any United States Attorney specially designated by the Attorney General" could authorize an investigative or law enforcement officer to apply to a court for a wire interception order in connection with enumerated crimes. Hearings Before the Senate Judiciary Subcommittee on Constitutional Rights, Wiretapping and Eavesdropping Legislation, 87th Congress, First Session (May 9, 10, 11, 12, 1961), at p. 5.

The Department of Justice proposed a modification

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<sup>42</sup> Cf. *United States v. Enmons*, No. 71-1193, decided February 22, 1973, as to the interpretation of a bill introduced and considered by an earlier Congress.

of the bill, so that Section 4(b) included the same authorizing language that is used in the present Section 2516(1); it thus required the centralization of wire interception policy through the Attorney General's power to designate applicants.

The explanation of the revision by Herbert J. Miller, Jr., then Assistant Attorney General in Charge of the Criminal Division, does not indicate, as the court below found, that the Department of Justice intended wire interception under Section 4(b) to require personal action by the Attorney General in every case. In his statement, Mr. Miller said "the Department of Justice believes that wiretapping should be dealt with in a manner analogous to searches and seizures of private papers." (Hearings, *supra*, at 356) He then made the statement quoted in the opinion below: "As I understand the bill, the application for a court order could be made only by the authority of the Attorney General or an officer of the Department of Justice or U.S. Attorney authorized by him. I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any Assistant Attorney General whom he may designate. This would give greater assurance of a responsible executive determination of the need and justifiability of each interception."<sup>43</sup>

Nothing in this statement indicates that a decision made in the Attorney General's Office, pursuant to a

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<sup>43</sup> Mr. Miller later testified: "The problem of control would be fairly easy in this respect because we propose modifications to the statute, only the Attorney General could authorize an application to a court and so you would have that control in the Attorney General. The Attorney General could, in turn,

delegation to the Attorney General's Executive Assistant to act for him when he was not available, would not satisfy those objectives, since the Attorney General formulates specific policy and remains directly responsible for assuring that each application is consistent with his policy.

It follows, we believe, that there is no reason to suppose that Title III was intended to eliminate *all* power of the Attorney General to act through his key aides in electronic surveillance matters. Although Section 2516 certainly limits the individuals who can establish and enforce the policy governing wire interceptions to the Attorney General and any specially designated Assistant Attorney Generals, it does not purport to preclude entirely the application of 28 U.S.C. 510. That statute provides:

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

That statute was enacted, along with 28 U.S.C. 509 vesting virtually all functions of the Department of Justice in the Attorney General, in order to facilitate the operations of the Department." Since enactment

report to you on what applications he had made or file a copy of its order so there would be the Executive control as well as the judicial control and you could get your reports as to what had transpired, either from the Attorney General or from the courts or from both, as far as that goes" (*id.* at 371).

"These sections derived from the Reorganization Acts of 1949 and 1950, which were designed to permit the head of an agency to better utilize the staff of his particular agency (H. Doc. No. 504, 81st Cong., 2d Sess., p. 2), and to "establish

of these sections, Congress has followed the policy there expressed and has nominally assigned almost all functions to be performed within the Department of Justice to the Attorney General.<sup>45</sup> Therefore, the requirement that "the Attorney General" must authorize the applications does not imply that he must do so personally, nor does the addition of the explicit authority to designate an Assistant Attorney General carry this implication, when read in light of the evidence discussed above that this definition of his authority was intended to centralize control and responsibility, without implying that personal action by these officials on each application was necessary.

The determination of which matters require his personal attention, and which matters may be delegated to others, and to what extent, is an extremely sensitive and crucial part of the Attorney General's performance of his duty.<sup>46</sup> Equally plainly, the number of matters to which he can devote his personal attention is limited, so that statutes should be read

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clear and direct lines of authority and responsibility for the management of the executive branch" (H. Doc. No. 503, March 13, 1950, 81st Cong., 2d Sess., p. 2).

<sup>45</sup> This policy has been generally followed in Title 18 and in other Titles. See, *e.g.*, 18 U.S.C. §§ 846, 1546, 1751, 2386, and Chapters 227 and 301-317 of Title 18. In some instances Congress has specifically provided that action may be taken by "the Attorney General or his designee" (see 18 U.S.C. 3503). In other instances Congress has specifically defined the term "Attorney General" to include any employee of the Department of Justice (see 18 U.S.C. 1961(10)).

<sup>46</sup> Cf. *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 369 (Douglas, J., dissenting): "Delegation is a matter of degree. An authority need not be delegated completely or not at all."

to require such attention only when congressional intent to do so is clear.

The requirement that the Attorney General or a specially designated Assistant Attorney General "may authorize an application" requires something more than the formal responsibility that these officials have for the acts of all their subordinates. But it does not, we submit, go to the other extreme of requiring their personal attention to each individual application. Instead, it demands, as a minimum, the amount of personal involvement necessary to establish specific policy in this area, and to assure personally that that policy is implemented in individual cases. These officials are, in short, personally answerable to Congress for the electronic surveillance applications authorized in their names.

Indeed, since Congress in Section 2516 was acting against the background of Sections 509 and 510, and did not clearly state that the functions being assigned were to be performed personally by the Attorney General,<sup>47</sup> some room must have been left to the Attorney General to delegate the authority to approve specific applications. As this Court stated in *United States v. Barnes*, 222 U.S. 513, 520:

[I]t is the settled rule of decision in this court that where there is subsequent legislation upon a subject it carries with it an implication that the general rules are not superseded, but are

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<sup>47</sup> As it did, for example, in § 101(a) of the Civil Rights Act of 1968, 18 U.S.C. 245(a).

to be applied in its enforcement, save as the contrary clearly appears."

A further reason for sustaining the Attorney General's delegation of authority to act on proposed wire interception applications when he was not personally available is the parallel between that narrow exercise of delegation and the narrow exception to the Warrant Clause for searches in "exigent circumstances". The Court has regularly held that the normal Fourth Amendment requirement that a search take place only under a warrant does not apply if there are exigent circumstances for conducting the search forthwith, and if it would be impracticable to secure a warrant, as long as there is probable cause for the search. See, e.g., *Schmerber v. California*, 384 U.S. 757, 770-771; *Carroll v. United States*, 267 U.S. 132, 153; *Cupp v. Murphy*, No. 72-212, decided May 29, 1973.

<sup>48</sup> The court below, in concluding that only the Attorney General or a specially designated Assistant Attorney General may authorize wire interception applications, relied on the maxim, *expressio unius est exclusio alterius*. But this maxim is more a description of a result than an aid in reaching it. As this Court has pointed out, the maxim is "a valuable servant but a dangerous master to follow in the construction of statutes" and "great caution" is required in dealing with it. *Ford v. United States*, 273 U.S. 593, 612. Moreover, the *expressio unius* maxim is particularly inapplicable here since the true question is not whether only the Attorney General or a specially designated Assistant Attorney General could authorize an application, but rather whether that language can be interpreted to require personal action by the individual occupying that office, as opposed to the normal and customary practice applied to the Justice Department in 282 U.S.C. 510 which permits the agency head to decide whether he should exercise a particular function personally or should instead define the policy to be followed and delegate the exercise of the function to subordinates.

Certainly a conversation concerning criminal activities is as elusive and "evanescent" (*Cupp, supra*, slip op. at 5) as blood alcohol, an automobile on the open highway, or fingernail scrapings. If the Constitution itself is sufficiently flexible to permit departures from the ordinary requirement of prescreening by a magistrate in such cases, there is little reason to suppose that Congress intended to forbid a similarly practical accommodation with the normal processing of wire interception applications under Title III,<sup>49</sup> especially when the Attorney General remained responsible and there was still the necessity of submitting the application to a federal judge. The Court should not impute to Congress an intent so rigid and unrealistic that it would prevent the Attorney General from allowing his Executive Assistant to implement established and understood policies when the Attorney General was unavailable to act, even in cases involving the danger that substantial evidence might disappear while his return was awaited.

Finally, the limited delegations at issue in this case served the essential policy of centralization and accountability established in Section 2516. The Attorney General did not attempt to empower investigators or attorneys in the field to decide when specific applica-

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<sup>49</sup> Indeed, Congress went so far as to permit wire interceptions without an antecedent court order in certain exigent circumstances. Section 2518(7) provides that in specific emergency situations "any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof" may intercept wire or oral communications for up to forty-eight hours pending submission of an application to the court for approval of the interception.



tions for wire interception orders should be submitted to district judges. Instead, relying on the intimate daily contact he had with his Executive Assistant, who had gained direct and personal familiarity with the Attorney General's policy in these matters, former Attorney General Mitchell went only so far as to authorize that specific senior official in his office to act on such applications when the Attorney General was not himself available.

The published regulations of the Department of Justice formally record that the Executive Assistant to the Attorney General, whose position is "established in the Office of the Attorney General," will assist the Attorney General in "matters submitted for the Attorney General's action" and perform "such other duties and function as may be specially assigned from time to time by the Attorney General." 28 C.F.R. § 0.6.<sup>50</sup> The limited delegation involved in this case left at the door of the Attorney General himself the responsibility for actions taken on his behalf by his Executive Assistant on electronic surveillance applications. Section 2516(1) of Title III requires no more.

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<sup>50</sup> The courts below seem to have suggested (Pet. App. 4a-5a, n. 3) that the Attorney General's direction to his Executive Assistant to act for him could not be valid unless published in the Federal Register. Any such intimation is unfounded. This direction to Mr. Lindenbaum, in accordance with 28 C.F.R. § 0.6, was a matter of internal management, not a matter concerning

**B. THE IDENTIFICATION OF THE ASSISTANT ATTORNEY GENERAL AS BEING "SPECIALLY DESIGNATED" BY THE ATTORNEY GENERAL TO APPROVE THE WIRE INTERCEPTION APPLICATIONS DID NOT RENDER ILLEGAL THE INTERCEPTIONS CONDUCTED PURSUANT TO COURT ORDERS**

Both the initial application and the extension application here stated that the Attorney General had "specially designated" the Assistant Attorney General for the Criminal Division to act "in this proceeding" to authorize the affiant to file the application (Pet. App. 3a, n. 1). As a result, the wire interception orders issued on these applications indicated that it was Assistant Attorney General Wilson who was the officer authorizing the applications, although it was actually the Attorney General (personally or through his Executive Assistant) who was responsible for the decision. To that extent, even though the papers reported involvement by the Attorney General in the process, they were imprecise on the question who had

which members of the public need be informed for guidance in their day-to-day affairs, or one in which non-publication could adversely affect any member of the public. Hence, neither the Administrative Procedure Act, 5 U.S.C. 552(a)(1), nor the Federal Register Act, 44 U.S.C. 1505, required publication of the delegation. See *Hogg v. United States*, 428 F. 2d 274, 280 (C.A. 6), certiorari denied, 401 U.S. 910; *United States v. Hayes*, 325 F. 2d 307, 309 (C.A. 4). In *Hayes*, the defendant objected to the admission in evidence of certain checks which had been certified as true by an employee of the Comptroller General. The relevant statute, 31 U.S.C. 46, provided in part that such documents were admissible in evidence "when certified by the Comptroller General or the Assistant Comptroller General under its seal." The court there held that under the general delegation authority of the Budget and Accounting Act, 31 U.S.C. 52(e), the delegation to the employee was proper without formal publication, despite the fact that the certification would be used outside the agency in the court proceeding.

made the operative decisions.<sup>51</sup> It is our submission, however, that since the wire interception applications were properly authorized under Section 2516, and since the court's findings of probable cause and necessity were not tainted by any misidentification, the identification of the Assistant Attorney General as being specially designated by the Attorney General to authorize the filing of the wire interception application, though it led inadvertently to a misunderstanding of who had made the operative decision, was legally immaterial. The following considerations support this conclusion.

Section 2518(1)(a) provides that each application for an interception order is to contain, among other items of information, the "identity of the investigative or law enforcement officer making the application, and the officer authorizing the application." Section 2518(4)(d) provides that each order shall specify "the identity of the agency authorized to intercept the communications, and of the person authorizing the application." The history of these requirements shows that they were intended to fix responsibility for the policy decision under which the interception order is sought, and thus to carry out the underlying purpose behind Section 2516 (S. Rep. No. 1097, 90th Cong., 2d Sess., at 101, 103). In requiring the name of the authorizing official, these sections give notice that the

<sup>51</sup> In the letter of authorization attached to the application, the Assistant Attorney General stated that the Attorney General has "specially delegated to me in this proceeding" the authority to act (Pet. App. 3a-4a, n. 2). The letter and application certainly put the court on notice that some action was taken by the Attorney General in connection with the particular application.

application complies with Section 2516, since an official authorized to act under that section has taken responsibility for the application. They thus avoid the necessity for an inquiry by the court before whom the application is pending to determine whether its submission was authorized under Section 2516.

These sections also serve an equally important secondary purpose. They facilitate the gathering of information which the judge must include in required reports. Under Section 2519, both judges and prosecuting officials are required to give the Administrative Office of the United States Courts information about all electronic surveillance applications, including the names of the prosecuting officials involved.<sup>52</sup> These reports are thereafter transmitted to Congress; they are "to form the basis for a public evaluation" of the operation of the Title III in order to "assure the community that the system of court-order electronic surveillance \* \* \* is properly administered" and to "provide a basis for evaluating its operation" (S. Rep. No. 1097, 90th Cong., 2d Sess., at 107).<sup>53</sup>

<sup>52</sup> The courts furnish this information within thirty days after the expiration of each order or after the denial of the order. The prosecuting officials furnish this information annually.

<sup>53</sup> As a part of Title III, Congress has provided for a National Commission for the Review of Federal and State Laws Relating To Wiretapping and Electronic Surveillance, Section 804 of Pub. L. 90-351, 82 Stat. 223, as amended by Pub. L. 91-644, Title VI, 84 Stat. 1892. The Commission was established effective June 20, 1973. It is charged with the duty of conducting a comprehensive study and review of the operation of the provisions of Title III during the six year period following its enactment (1968-1974). The Commission is required to make such interim reports as it deems advisable and make a final report of its findings and recommendations to the President and the Congress within two years following its establishment (by June 20, 1975).

In light of the purely informational purposes of Sections 2518(1)(a) and 2518(4)(d), an incorrect statement in the application should not be grounds for vitiating a court's wire interception order. The validity of the order should stand or fall on the basis on what was in fact done pursuant to Section 2516 in authorizing the application.<sup>54</sup> Since the congressional purpose was served by the authorization procedure at issue here, the misidentification of the Assistant Attorney General as making the operative decision was not significant. Certainly, it was not intended to mislead. There is no conceivable purpose to be served by deception. The Attorney General, moreover, identified himself as having approved all applications in reports filed with Congress. There could hardly be clearer evidence that the misidentification here was inadvertent.

The statement in the application indicating that the Assistant Attorney General acted when in fact action was taken personally by the Attorney General or by his Executive Assistant on his behalf is in no sense the equivalent of a misidentification of his sources by an affiant who swears to the basic facts upon which an application for a search warrant is based. The court must appraise the affiant's facts to determine whether probable cause exists and is handicapped in weighing the persuasiveness of such facts if the sources

<sup>54</sup> Note, however, that Section 2518(10)(a) provides for a motion to suppress only on the ground, *inter alia*, that "the order of authorization or approval under which it [a conversation] was intercepted is insufficient on its face \* \* \*" (emphasis added), thus indicating that Congress did not contemplate efforts to go behind the face of the papers.

given are false. It is for this reason that courts have suppressed evidence where the true source of such factual allegations has been concealed. See *King v. United States*, 282 F. 2d 398 (C.A. 4); *United States ex rel Pugh v. Pate*, 401 F. 2d 6 (C.A. 7).

No comparable defect exists because of a misstatement as to the authorizing official when in fact the application has been authorized by or on behalf of the Attorney General. The finding of probable cause that the federal judge is called upon to make is based solely on the affidavit of the attorney or investigator who is familiar with the facts, and is not based on any averments or representations by the officials of the Department of Justice who permit the application to be filed. The statute recognizes this distinction between the facts upon which the application is based and the statement of identity of the authorizing officer. Under Section 2518(3), the court is required to make a determination "on the basis of the facts submitted" as to whether there is probable cause and whether normal investigative techniques are adequate. The statute does not suggest that the court should give any consideration to whether an application is authorized by the Attorney General or an Assistant Attorney General—it merely requires the order to specify which high official authorized the application.

The statements in the application papers as to the name of the authorizing official have not led to a "guessing game" to discover who in fact approved the application, as the court asserted in *United States v. Chavez*, No. 72-1319, certiorari granted May 21, 1973. The person who acted has been readily identifiable.

See, e.g., *United States v. Pisacano*, *supra*, 459 F. 2d at 264. To be sure, the statements in the application turned out to be inartful because they led to the interpretation that the Assistant Attorney General was the authorizing officer. But any confusion that has been caused by the application papers has been easily resolved. As this and other pending cases illustrate, it has been easy to ascertain by affidavits whether in fact the Attorney General, the Assistant Attorney General or the Attorney General's Executive Assistant has approved a particular application.<sup>55</sup> The details of the authorization procedure were similarly ascertainable by interrogatories and testimony.

Accordingly, there is simply no basis for concluding that what at worst involved careless clerical drafting of form memoranda in the Department of Justice should be treated as a major breach of the requirements of Title III. The description of how the applications came to be submitted to a federal judge for consideration shows that this process had no sinister or malevolent purpose. Nor was it calculated to mislead the court as to any material facts or to conceal from Congress or the public the Attorney General's personal responsibility for each of the wire interception applications submitted in this way—each of

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<sup>55</sup> The court below apparently was troubled by the fact that the letter to the field attorney notifying him that an application to the court had been authorized was signed in the Assistant Attorney General's name by one of his deputies (Pet. App. 4a). Since notifying the attorney that approval had been granted was a purely ministerial function, Mr. Wilson's authorization to his deputies to sign the letters in his name was appropriate. See *Hannibal Bridge Co. v. United States*, 221 U.S. 194, 206.

which was in fact reported to the Administrative Office for official publication as having been approved by the Attorney General. Thus, this Court should rule, as have all but one of the courts of appeals (the Ninth Circuit) that have addressed this question, that the identification problem presents at most a technical or formal deviation from Title III's procedures and not a substantial legal error.

III. THE APPLICATION FOR THE SECOND INTERCEPTION ORDER, WHICH WAS PERSONALLY APPROVED BY THE ATTORNEY GENERAL, AND THE PEN REGISTER EXTENSIONS WERE NOT "TAINTED" BY THE EARLIER ORDER INVOLVING HIS EXECUTIVE ASSISTANT

As we described in the Statement, the district court held that "pen registers" are not devices covered by Title III because they do not intercept communications, but instead record only telephone numbers dialed from a particular phone. The initial court-authorized installation of one of those devices pursuant to an ordinary search warrant was thus approved by the district judge, after a finding that the issuing judge had probable cause for the order.<sup>56</sup> The two orders

<sup>56</sup> Although it is clear, as the district court found, that the provisions of Title III are not applicable to the use of pen registers (see S. Rep. No. 1097, *supra*, at 90, 107), it is not clear whether or not the use of the pen register constitutes a search within the meaning of the Fourth Amendment so that a search warrant pursuant to Rule 41, Fed. R. Crim. P., is even required. Earlier cases holding the use of pen register equipment invalid under Section 605 of the Federal Communications Act, 47 U.S.C. 605 (See *United States v. Dote*, 371 F. 2d 176 (C.A. 7); *United States v. Covello*, 410 F. 2d 536 (C.A. 2)) are no longer applicable in view of the amendments to Section 605 by section 803 of Title III, making it clear that those provisions now ap-



extending the use of the pen register, however, were held tainted because the affidavits submitted to obtain those extensions made use of information acquired under the court-approved wire interception which had followed what the district court found was the misidentification of the authorizing officer. The court held that this defect tainted the affidavits for the pen register warrants and also vitiated the second wire interception order, the application for which had actually been approved by the Attorney General.

The court of appeals affirmed the suppression orders covering both wire interception orders and the pen register extension warrants, after it concluded that approval of the submission of the first application for an interception order by the Attorney General's Executive Assistant was improper. Even though the second application was personally approved by the Attorney General, the court apparently concluded that the consideration of the fruits of the first order tainted the second interception order and the two pen register extensions.

Although we have argued above that suppression is not warranted on either of the two alternative grounds used by the courts below, and that the procedures followed complied with Title III, we set forth in this final part our arguments that any deficiency in the authorization or identification of the authorizing offi-  
ply primarily to radio communications, while Title III deals with wire communications. See *United States v. King*, 335 F. Supp. 523, 548-549 (S.D. Calif.); *United States v. Vega*, 52 F.R.D. 503, 507 (E.D. N.Y.). In an abundance of caution, however, separate court orders were obtained for the pen registers in this case.

cer in connection with the first interception order did not taint the subsequent court orders.

It is well established that reliance upon illegally obtained evidence in an affidavit for a search warrant does not vitiate the warrant if the remaining allegations sufficiently demonstrate probable cause.<sup>57</sup> This rule derives from *Nardone v. United States*, 308 U.S. 338, 341 where the Court pointed out:

Here, as in the *Silverthorne* case, the facts improperly obtained do not "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. 251 U.S. 385, 392.

Therefore, even should this Court find the original authorization by the Attorney General's Executive Assistant to be defective, and even should suppression of evidence under that order be required, the evidence derived from the other interception or from the pen registers ought to be suppressed only if there were no adequate independent grounds for the orders permitting them.

The affidavits on which the second interception order (dated November 6, 1970) and the pen register extension orders were based reasserted the facts, details and conclusions contained in the affidavit on which the original interception order (dated October 16, 1970) had been based (A. 66). It also recited

<sup>57</sup> See, e.g., *United States v. Lucarz*, 430 F. 2d 1051, 1054 (C.A. 9); *Howell v. Cupp*, 427 F. 2d 36, 38 (C.A. 9); *United States v. Sterling*, 369 F. 2d 799, 802 (C.A. 3).

an October 17, 1970, sale of heroin by defendant Giordano to a narcotics agent that was completely unrelated to, and devoid of any possible taint from, the October 16 wiretap. See *United States v. Giordano*, No. 72-6167, certiorari denied April 23, 1973 (A. 68). The affidavit for the October 22, 1970, pen register extension order also rested on the earlier affidavit for the pen register as well as on the October 17, 1970, sale of heroin (A. 54-55).

Since the facts set out in the original affidavit on which the October 16 interception order was based had come from untainted sources and were found by the district court to constitute probable cause, and since they were restated and in fact augmented by information about the October 17 narcotics sale, we submit that these facts lawfully demonstrated probable cause for issuance of the later orders, independently of the additional information derived from initial interception.<sup>28</sup> Suppression of the November 6 wire interception order and the two pen register extension orders is therefore not justified; they were not the "fruit" of the first interception order, even if that "tree" were to be considered "poisoned". As we pointed out above (pp. 33-39) the exclusionary rule codified in 18 U.S.C. 2515 reflects existing search and seizure law. Its prohibition against the use of derivative evidence from an illegal wiretap is therefore equivalent to the "fruit of the poisonous tree" doctrine, and thus does not apply here to invalidate orders that were supported by adequate, untainted information.

<sup>28</sup> 18 U.S.C. 2518(1)(e) and 2518(1)(f) require a full and complete statement concerning all previous wiretap applications.

Finally, we submit, assuming *arguendo* a defect in the authorization of the application for the initial interception order by the Attorney General's Executive Assistant, the Attorney General himself specifically assumed full personal responsibility for that application when he authorized the application for the extension instituted on November 6. At least in such circumstances, any preliminary defect in the October court-authorized interception is minimized, and the interceptions should not be treated as an effort to exploit "illegal" conduct so as to make the "fruit of the poisonous tree" doctrine applicable. See *Wong Sun v. United States*, 371 U.S. 471, 488; *United States v. Bacall*, 443 F. 2d 1050, 1055-1061 (C.A. 9), certiorari denied, 404 U.S. 1004; *United States v. Iannelli*, 339 F. Supp. 171, 177-179 (W.D. Pa.); cf. *Harrison v. United States*, 392 U.S. 219, 228-235 (dissenting opinion of Mr. Justice White). In light of the Attorney General's personal participation in the second authorization, it would be an unwarranted application of the exclusionary rule without respect for the purpose for which it was formulated to suppress all of the evidence here. In short, the defect which the court below found in the original authorization does not warrant a drastic extension of the "the fruit of the poisonous tree" doctrine when the Attorney General's personal intervention purged any taint."

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<sup>99</sup> *United States v. Roberts*, petition for certiorari pending, No. 72-1475, involves the broader implications of a holding extending the "fruit of the poisonous tree" doctrine to subsequent interceptions.

## CONCLUSION

For the above stated reasons, the judgment of the court below suppressing the evidence in these cases should be reversed.

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

HENRY E. PETERSEN,  
*Assistant Attorney General.*

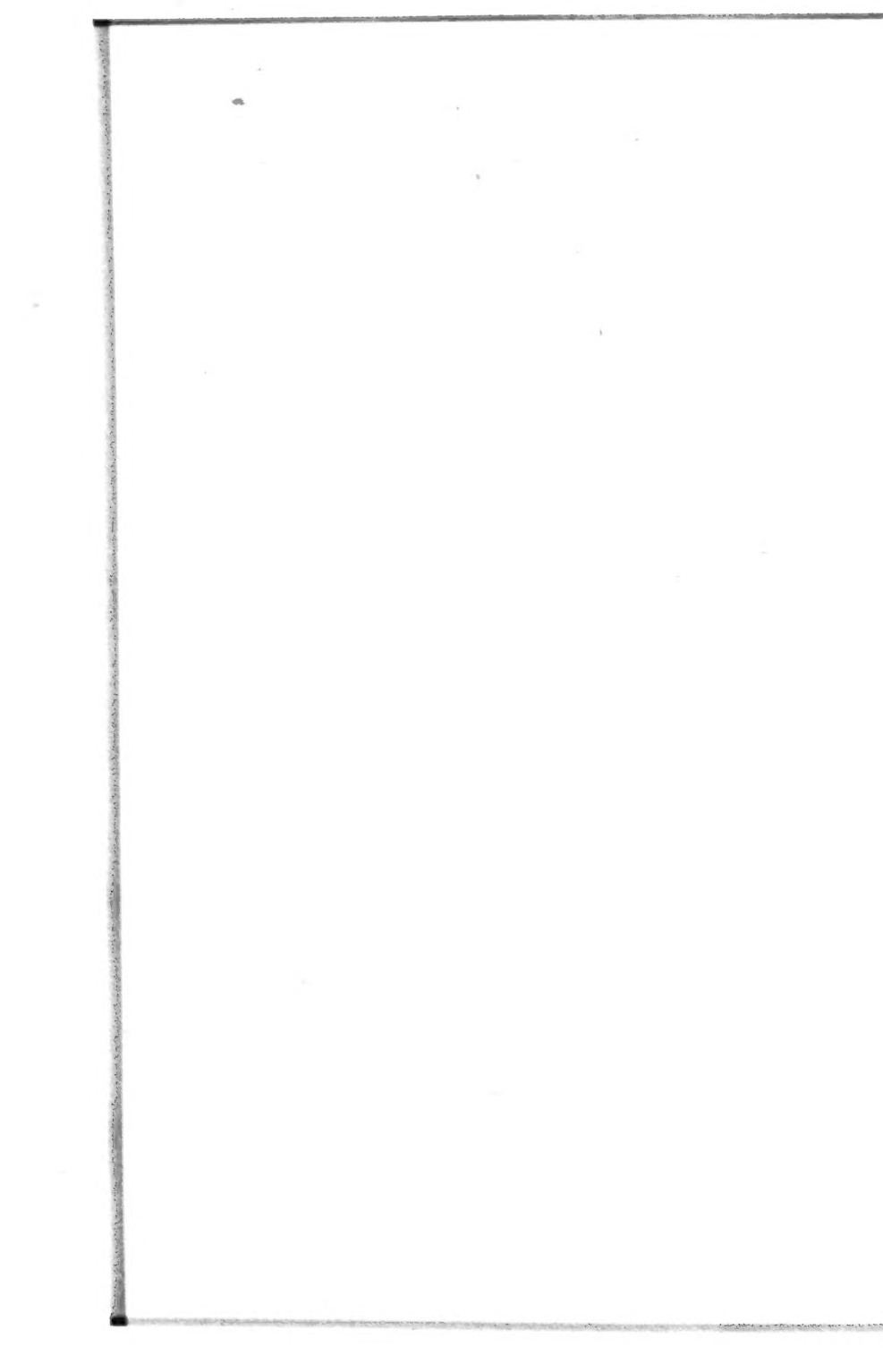
HARRIET S. SHAPIRO,  
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JULY 1973.



## APPENDIX

### STATUTES INVOLVED

#### *28 USC 509 provides:*

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

- (1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;
- (2) of the Federal Prison Industries, Inc.;
- (3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and
- (4) of the Board of Parole.

#### *28 USC 510 provides:*

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

#### *18 USC 2510 provides:*

As used in this chapter—

\* \* \* \*

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

\* \* \* \*

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

\* \* \* \* \*

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

*18 USC 2511 provides in part:*

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate



or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

\* \* \* \*

*18 USC 2514 provides:*

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence

subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

*18 USC 2515 provides:*

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

*18 USC 2516 provides in part:*

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of

wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

\* \* \* \*

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

\* \* \* \*

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

\* \* \* \*

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery,

bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

*18 USC 2517 provides in part:*

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

\* \* \* \*

*18 USC 2518 provides in part:*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including- (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to

the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such of-

fense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

\* \* \* \* \*

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

\* \* \* \* \*

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the



contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

\* \* \* \* \*

*18 USC 2519 provides:*

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by

the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report

concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

*18 USC 2520 provides:*

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.



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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 72-1057

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

DOMINIC NICHOLAS GIORDANO, *et al.,*  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR THE RESPONDENT GIORDANO

---

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*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

**BRIEF FOR THE RESPONDENT GIORDANO**

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As permitted by Rule 40(3) of the Rules of the Supreme Court of the United States, this brief for the Respondent Giordano shall not contain: a reference to the official reports of the opinions delivered in the courts below; statement of jurisdictional ground; questions presented; statutes involved, nor a statement of the case.

**SUMMARY OF ARGUMENT**

**I**

The record in this case shows that the wiretapping of the telephone of the Respondent Giordano conducted under Title III of the Omnibus Crime Control and Safe

Streets Act of 1968 was fatally defective because the Government willfully adopted an authorization procedure that violated §2516(1) of the Act. The Government, moreover, willfully failed to correctly identify in the application for the wiretap the official who authorized the same, as required by §2518(1)(a). This thereby produced a similar incorrect identification in the interception order, contrary to the requirements of §2518(4)(d). In a criminal prosecution brought in the U.S. District Court against the respondent and others based principally on the contents of the wiretaps, the Court, upon the motion of the defendants, suppressed the wiretap evidence and its derivatives for violations of the identification requirements in the application and the order. *United States v. Focarile*, 340 F. Supp. 1033 (D.C. Md. 1972). The Circuit Court, upon review, perceived that violation of the authorization requirement was more controlling; and affirmed the District Court result in this case. *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972). Both Courts deemed that suppression was warranted by the remedy and sanction provisions of the Act, §§2515, 2518(10)(a)(i) and (ii).

The provisions of Title III breached by the Government in this case were "protective procedures" enacted by Congress to implement the Fourth Amendment values inherent in the Act. The plain wording and the legislative history of these provisions indicate they are central to the portions of the Act, which were responsive to the constitutional requirements enunciated in *Berger v. New York*, 388 U.S. 41 (1967), *Katz v. United States*, 389 U.S. 347 (1967). The vast majority of lower Federal Courts which have dealt with the same questions in this case upon identical facts, have reached the same results as the lower Courts here.

It is not necessary to identify the "protective procedures" created by the sections in the Act dealing with authorization and identification as related to safeguarding Fourth Amendment rights in order to justify the suppression orders of the Courts below. The remedy and sanction provisions of the Act, noted above, read together clearly provide the authority for suppression.

Section 2515 of the Act provides essentially that no part of the contents of a wire interception nor evidence derived from it may be received in evidence in any trial if the disclosure of that information would be in violation of the Act. Section 2518(10)(a)(i) and (ii), provide that an aggrieved person may move to suppress if the communication was unlawfully intercepted or if the order under which the interception was made is insufficient on its face. Indeed, these provisions mandate suppression. The Act, in terms of remedy, is self-executing. Again, the plain wording of these provisions, their legislative history, and the judicial interpretations unquestionably support this conclusion.

The major argument that the Government makes against suppression in this case is based upon two faulty premises: (1) that suppression of evidence in a criminal case is a judicially created rule of exclusion; and (2) that this rule should be invoked only in cases where there have been violations of constitutional rights, or rights of constitutional magnitude. The fundamental flaw in the first part of this reasoning is that the basis for the suppression ordered in this case was not a rule created by the Court, but the explicit remedy provisions of the Act. This being so, the weakness in the second premise of the Government is apparent. Since the Act contains remedy and sanction provisions, the magnitude of the violation warranting their application need not be of constitutional magnitude. It matters not that the Govern-

ment's screening and review procedures were extensive in this case. The procedures utilized were not in compliance with the provisions of the Act.

Advancement by the Government of "other considerations"—correction of the previously defective authorization and identification procedures, the non-applicability of this Court's retroactivity doctrine, and the inability to maintain future prosecutions based on wiretap evidence gathered through defective procedures—as a basis for reversal of the suppression sanctions imposed by the lower courts, are all legally insubstantial.

## II

The Government next argues broadly that the authorization and identification procedures followed in this case complied with the requirements of the Act. Section 2516(1) of the Act requires that the Attorney General, or an Assistant Attorney General, specially designated by the Attorney General, authorize an application for an order authorizing interception of wire communications. Sections 2518(1)(a) and 2518(4)(d), respectively, require that the application and the order identify the officer authorizing the application. When the application in this case reached the Office of the Attorney General he was away. Sol Lindenbaum, his Executive Assistant authorized the application. He affixed the Attorney General's initials to a memorandum directed to Will Wilson, as Assistant Attorney General, which purported to be a designation to Wilson to authorize the application. A letter was addressed to the supervising attorney in this case, Francis S. Brocato, which appeared to be from Will Wilson authorizing the application. Will Wilson did not sign the letter. Will Wilson did not ever see any of the papers in the case. The application and the interception



order recited that Will Wilson was the official who authorized the application pursuant to a proper designation from the Attorney General. The interception of wire communications from the telephone of the respondent Giordano, under the order, was for 21 days. In no respect were the provisions of the Act concerning authorization and identification complied with by the Government in seeking or obtaining the interception order. Later, an application for authority to extend the interception order was processed by the Government. The contents of the initial interception comprised a substantial and material part of the probable cause asserted in the moving papers for the extension order. In connection with this request for an extension, the Attorney General initialed a memorandum directed to Assistant Attorney General Will Wilson in which he specially designated Wilson to authorize this request. A letter purportedly from Wilson was sent to the supervising attorney, Brocato, advising him that in accordance with 2516(1), the Attorney General had specially designated him to authorize the extension request and he (Wilson) was in fact doing so. This was not correct. The application repeated the incorrect representation that Wilson was the official who had authorized it. The order that was entered by the Court authorizing the wiretap extension incorrectly identified Wilson as the official who had authorized the application.

In this Court the Government renews its argument that Sol Lindenbaum was the "alter ego" of the Attorney General with respect to wiretap applications. Additionally, the Government again argues that 2516(1) did not preclude entirely the application of 28 U.S.C. 510. This statute gives the Attorney General the right to make provisions authorizing the performance by any other officer, employee, or agent of the Justice Department of

any of his functions. The Circuit Court opinion effectively lays to rest the "alter ego theory" advanced by the Government. The legislative history of §2516 spells out the Congressional intent to limit the initiation of a wiretap authorization to "a publicly responsible official, subject to the political process." Mr. Lindenbaum is not an official "subject to the political process." The argument of the Government based on 28 U.S.C. 510 is dispatched by a consideration of the rules of statutory construction. Sec. 2516(1) is narrow, specific, and limited in its terms. A general, permissive statute cannot be read so as to broaden it. Specific terms must prevail over general ones in the same or another statute which otherwise might be controlling. The enumeration of certain things in a statute implies the exclusion of all others. 28 U.S.C. 510 was in existence prior to the enactment of Title III, and is in an entirely different section of the United States Code. Centralization of policy and responsibility were important purposes to be accomplished by Section 2516, as were also the limitation on the kind and number of officials who could exercise the authorization function.

The Government attempts to justify the identification defects in the application and the order by asserting that the spirit, if not the letter, of the law was met. The identification requirements demand strict compliance. They cannot be ignored or overlooked on the theory that they are not of constitutional dimension. It does not matter, as the Government argues, that misidentification does not taint the Court's finding of probable cause and necessity. The answer to these contentions is that the procedures adopted by the Government in utilizing Title III must pass both constitutional and statutory tests of compliance.

## III

The Government argues finally that the evidence gathered by the extension order is admissible and should not have been suppressed. This argument is specious. The moving papers for the extension order showed that a substantial and material basis of the showing of probable cause for further wiretapping was the contents of interceptions made under the initial defective wiretap. The District Court so found. The application for the extension order contained many of the defects existing in the initial one. Unquestionably, there was a misidentification of the official who authorized the application. The affidavit of Sol Lindenbaum states that it was the Attorney General who did so. The application and order recites that Will Wilson authorized the application. Will Wilson did not sign the authorization. The extension application and order were as infirm in terms of the identification requirements as were the initial ones.

## ARGUMENT

## I.

**IN THIS CASE SUPPRESSION OF THE EVIDENCE GATHERED BY A WIRE INTERCEPTION CONDUCTED UNDER TITLE III IS MANDATED BY THE SEVERAL AND SUBSTANTIAL VIOLATIONS OF THE REQUIREMENTS OF THE STATUTE CONCERNING AUTHORIZATION AND IDENTIFICATION.**

In its brief for this Court the Government has rearranged the order of its attack. Reversing the presentation it made in the Circuit Court, the Government here postpones offering arguments to justify the flawed authorization and identification procedures it employed in seeking and obtaining the initial wiretap of

the petitioner Giordano's telephone. The Government prefers to first lay before this Court its contention that suppression of the evidence gathered by a wiretap<sup>1</sup> is a drastic remedy to apply where the authorization requirements (§2516(1))<sup>2</sup> and the identification requirements (§2518(1)(a) and (4)(d))<sup>3</sup> of Title III have not been complied with. We propose to deal with the Government's arguments in the order in which they are made. It is obviously difficult to speak first to the question of whether the remedy, so to speak, fits the wrongdoing,

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<sup>1</sup> The interceptions of wire communications conducted in this case were done under the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510-2520, hereinafter called "Title III", or the "Act".

<sup>2</sup> Title 18 U.S.C. §2516(1) provides, *inter alia*:

"The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications. . . ."

<sup>3</sup> Title 18 U.S.C. §2518 provides in part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

\* \* \*

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

\* \* \*

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; . . ."

when issues concerning the nature of the wrongdoing are to be dealt with secondly. It is thus indicated that a brief synopsis of the operative facts be set forth.

During the month of September and going into early October 1970, the Baltimore office of the Bureau of Narcotics and Dangerous Drugs (Department of Justice), was conducting an investigation into the alleged narcotics trafficking of the petitioner, Dominic Giordano and others. Shortly before the middle of October a decision was reached by the Bureau and the Office of the United States Attorney to seek a Title III wiretap order from the United States District Court for the District of Maryland for Giordano's home telephone.<sup>4</sup> Papers for that purpose were prepared, consisting of: (1) an application by Francis S. Brocato, Assistant United States Attorney, who was the supervising attorney in the investigation (App. 21-25); (2) affidavit of Wayne A. Ambrose, a special agent of the BNDD, who was in charge of the investigation (App. 26-46); (3) the affidavit of Abraham L. Azzam, a Group Supervisor of the BNDD, who was Agent Ambrose's supervisor (App. 47-48); and (4) a proposed order authorizing the interception. This "package" was forwarded to the Department of Justice for processing, review and ultimately for authorization by the Attorney General<sup>5</sup> or by an Assistant Attorney General specially designated by him, in accordance with §2516(1) (see footnote 2). The affidavit of Harold P.

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<sup>4</sup>Telephone number 301-685-0211, located at (App. 24) 8 Charles Plaza, Apartment 1304, Baltimore, Maryland. This was the telephone number of Giordano's apartment on October 16, 1970. Later during the period (App. 55) material in this case, it was changed to 301-685-2332.

<sup>5</sup>The Honorable John N. Mitchell, Esquire was the Attorney General at the time.

Shapiro, Deputy Assistant Attorney General, Criminal Division, describes the processing of these papers within the Division, the favorable recommendation given to the application at the various levels at which they were reviewed, and the forwarding of them to the Office of the Attorney General (App. 100-101). On October 16, 1970, when the papers reached the Office of the Attorney General, he was "on a trip away from Washington, D.C." (affidavit of Sol Lindenbaum, Executive Assistant of the Attorney General, App. 96-97, at p. 97). His Executive Assistant, Mr. Sol Lindenbaum, "reviewed the submitted material and concluded that the request in this case satisfied the requirements of the statute." *id.* He also concluded, from his "knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him." *id.* Sol Lindenbaum "approved the request," *id.*; that is, he authorized the application. (§2516(1)) He caused the Attorney General's initials to be placed on a memorandum to Will Wilson,<sup>6</sup> Assistant Attorney General. "The memorandum . . . approved a request that authorization be given to Francis S. Brocato to make application for an interception order." *id.* A letter was prepared to Mr.

<sup>6</sup>The memorandum, dated October 16, 1970, was from John N. Mitchell, Attorney General, to Will Wilson, Assistant Attorney General, Criminal Division, and read as follows:

"Subject: *Interception Order Authorization*

"This is with regard to your recommendation that authorization be given to Assistant United States Attorney Francis S. Brocato, District of Maryland, to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty-one (21) day period to and from telephone number 301-685-0211, located at 8 Charles Plaza, Apartment 1304, Baltimore, Maryland, in connection with the investigation into possible violations of Title 21, United States Code, Section 174 and 26 United States Code,

Brocato purportedly from Mr. Wilson, which, on account of its importance in this case, is substantially here set out in full:

"This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications to and from telephone number 301-685-0211, . . . .

*"I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Nicholas Giordina (sic) and others as yet unknown have committed, are committing, or are about to commit offenses enumerated in Section 2516 of Title 18, United States Code, . . . . I have further determined that there exists probable cause to believe that the above person makes use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.*

*"Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of*

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Sections 4704(a), 4705(a) and 7237(a) and (b) by Nicholas Giordina and others as yet unknown.

*"Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Francis S. Brocato to make the above-described application." (App. 98).*

*the Court pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications from the facility described above, for a period of twenty-one (21) days."* (App. 25-26). (Emphasis supplied).

In the record of this case it is conceded that Mr. Wilson did not sign the letter.<sup>7</sup> In fact there is no evidence that he even knew of its existence, or had any knowledge of any of the facts contained therein.<sup>8</sup> Mr. Brocato's

<sup>7</sup>At a hearing in the District Court in this case upon the defendant's motion to suppress the contents of the intercepted wire communications on account of the statutory violations here involved, the Assistant U.S. Attorney (Mr. Brocato) said to the Court in response to its question:

"MR. BROCATO: Well, the office of the—The problem here, Judge, is that I can't tell you who signed it. *I know that Will Wilson personally made none of those determinations*, but indeed with regard to the Court's reasoning in this case, that would apply to every Title 3 throughout the United States, because *Will Wilson made no determinations at any point*, and it's very surprising if you find a letter which was signed by Will Wilson. In fact, we were trying to find out—I recall personally when we were trying to find out who signed the Will Wilson letter, and they indicated maybe Will Wilson signed it, and everyone laughed. And they had to find an actual piece of paper which was signed by Will Wilson, which was awfully difficult to find, but finally they did, but it wasn't Will Wilson who had signed that letter. . . ." (App. 106). (Emphasis supplied).

<sup>8</sup>Pursuant to the remand ordered by the Fifth Circuit in *United States v. Robinson*, 472 F.2d 973 (5th Cir. 1973), an evidentiary hearing was held before Justice J. Mehrrens (S.D. Fla.) in a cluster of cases (referred to in Pet's. brief, *United States v. Marder*, p. 5, n.2) on March 19, 20, 1973 to take testimony from the various government officials involved in the authorization, screening, and review procedures in the Justice Department of Title III applications. Will Wilson testified at his hearing. On cross-examination, he said he occasionally saw the authorization memorandum from the Attorney General (Tr. 261). As to the so called "Will Wilson letter", he said



application (with attachments and exhibits) was submitted to Chief Judge Northrop of the District Court on October 16, 1970. Paragraph 2 of the application is significant here:

*"2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A." (App. 22). (Emphasis supplied).*

Attached to the application as Exhibit A was the Will Wilson letter, *supra* as well as the affidavits of Agent Ambrose, *supra*, and Group Supervisor Azzam, *supra*. A proposed order was also submitted to the Court. The proposed order, which was signed by Judge Northrop (App. 49-51), provided in part as follows:

"Wherefore, it is hereby ordered that:

"Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application

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he did not know they were being submitted to United States District Courts. In fact, he "did not know exactly what was made of them." (Tr. 261) He did not know that Mr. Lindenbaum was signing the Attorney General's initials to the designation memos. He did not know that anyone other than the Attorney General authorized the wiretaps (Tr. 263). The Attorney General never granted him authority to approve applications for a wiretap (Tr. 266).

authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to:

"(1) intercept wire communications of Nicholas Giordina (sic). . . ." (App. 50-51).

Pursuant to the order, wire communications were intercepted over the subject telephone of the petitioner Giordano for a period of 21 days.

The facts, without comment or elaboration, make it clear that in this case there were compound violations of Title III in the authorization requirement (§2516(1)) and in the identification ones (§2518(1)(a) and (4)(d)). This case represents a situation where Sol Lindenbaum, the Executive Assistant to the Attorney General,<sup>9</sup> approved the authorization and some unknown person

<sup>9</sup>"The Executive Assistant to the Attorney General is not an office created by statute as is the Deputy Attorney General or the nine Assistant Attorneys General who are appointed by the President by and with the advice and consent of the Senate, to assist the Attorney General in the performance of his duties, 28 U.S.C. §§504, 506. Rather it is a post established in the Dept. of Justice by administrative regulation to assist the Attorney General in various matters submitted for the Attorney General's action and perform such other duties and functions as may be specially assigned from time to time by the Attorney General. 28 C.F.R. ¶0.6." *United States v. Cihal*, 336 F. Supp. 261, 263, n.1 (W.D. Pa., 1972).

In some of the cases, Lindenbaum, in placing the Attorney General's initials on the memorandum, acted "...under oral instructions by Mitchell [the Attorney General] after a long distance telephone conference with [him]." *United States v. Laff*, \_\_\_ F. Supp. \_\_\_ (S.D. Fla., 5-31-73) (No. 70-450 Cr. P.F.); *United States v. Vasquez*, 348 F. Supp. 532 (C.D. Cal. 1972).

signed Will Wilson's name to the authorization. The authorization letter (of Will Wilson) to Assistant United States Attorney Brocato represented that the Attorney General had specially designated him (Wilson) to authorize the application; and that Wilson had done so. As had been shown, these representations were not true. The application of Brocato, filed in the District Court, reiterated these false statements. These erroneous statements of authorization and identification were further repeated in the order.<sup>10</sup> The District Court (Miller, J.) upon ascertaining these facts, determined that the violations of the identification requirements (§ 2518(a)(1) and (4)(d)) justified suppression of the contents of the wiretap and of all evidence derived from it. (*United States v. Focarile, supra.*) The approach by Judge Sobeloff of the Circuit Court was different. (*United States v. Giordano, supra.*) He found that the authorization violation (§ 2516(1)) was the principal one and concluded that it, along with the others, were grave enough to warrant suppression to the same extent as that ruled by the District Court. Where the exact combination of these violations have appeared factually, the majority of Federal Courts have decreed suppression.<sup>11</sup>

<sup>10</sup>This conglomeration of false and misleading statements in the documents has been characterized by the Ninth Circuit as a "paper charade", *United States v. King*, 478 F.2d 494 (9th Cir. 1973); and, "button, button, whose got the button", *United States v. Chavez*, 478 F.2d 512 (9th Cir. 1973).

<sup>11</sup>*United States v. Robinson*, 468 F.2d 189 (5th Cir., 1972) and later opinion, 472 F.2d 973 (en banc); *United States v. Mantello*, 478 F.2d 671 (D.C. Cir., 1973); *United States v. King*, 478 F.2d 494 (9th Cir., 1973); *United States v. Roberts*, 478 F.2d 1405 (7th Cir., 1973); *United States v. Fox*, 349 F. Supp. 1258 (S.D. Ill., 1972); *United States v. Wierzbicki*, 12 Cr.L.R. 2075 (E.D. Mich., Sept. 15, 1972); *United States v. Narducci*, 341 F. Supp. 1107

Later, on November 6, 1970, an application for extension of the interception order was made to the District Court and was approved.<sup>12</sup>

(E.D. Pa., 1972); *United States v. Aquino*, (with respect to extension order) 338 F. Supp. 1080 (E.D. Mich., 1972); *United States v. Baldassari*, 338 F. Supp. 904 (M.D. Pa., 1972); *United States v. Cihal*, *supra* note 9.

<sup>12</sup>The Attorney General personally initialed a memorandum to Will Wilson, Assistant Attorney General, captioned "Interception Order Authorizing Extension." (App. 98-99). The said memorandum provided in part:

"Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially delegated to exercise that power for the purpose of authorizing Francis S. Brocato to make the above-described application." (App. 99).

Sol Lindenbaum's affidavit (App. 96-97) stated that in regard to this request for authorization to make application for an extension order, the Attorney General approved the request (App. 97). Another Will Wilson letter of authorization was directed to Mr. Brocato in connection with the extension application (App. 64). This letter contained all the false and misleading representations of personal review, etc., as was set forth in the letter of October 16, 1970. The letter also revealed that the authorization to extend the wiretap was from Will Wilson, "under the power specially delegated to me [Will Wilson] in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code. . . ." (App. 65). This representation conflicts with the affidavit of Shapiro that the Attorney General approved the request. The order of extension falsely identified Will Wilson as the official who authorized the extension application (App. 83). Many of the cases that have viewed the action of the Attorney General placing his initials on such a memo have considered that tantamount to a proper authorization under Section 2516(1). See Govt's. brief p. 33, n.22. The rationale of such holdings, according to J. Sobeloff, is: "the fact that the judge may have been told that

- A. The provisions of Section 2516(1) and 2518(1)(a) and (4)(d) prescribe procedures that are protective of and directly related to the Fourth Amendment values of Title III, such that a violation of them warrants suppression of the contents of wire interceptions and evidence derived therefrom.

To facilitate the argument that suppression of evidence is a drastic remedy, the Government concedes *arguendo* the complex of statutory violations found by the two courts below (Pet's. Brief, p. 29); but it takes the position that these breached requirements are not central to Fourth Amendment values<sup>13</sup> and that the sanction for

Will Wilson rather than Mitchell was the source of the authorization was a matter of form, not substance." 469 F.2d at p. 530.

A few cases have reached the conclusion that even if the Attorney General did initial a similar memo to Will Wilson, and thereby authorize the application, the failure of the application and the order to identify him as the authorizing official as required by 2518(1)(a) and (4)(d) rendered the interception defective. *United States v. Chavez*, *supra* note 10; *United States v. Boone*, 348 F. Supp. 168 (E.D. Va., 1972). We leave this conflict and contrariety in the cases as we find it. For in this case if the initial interception falls, then the evidence gathered by the extension order must also fall as "fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341 (1939).

<sup>13</sup>In the Government's conceptualism the statute deals with at least two distinct groups of rights: (1) "those that incorporate Fourth Amendment concerns" (Pet's. brief p. 31), otherwise labeled "the right of privacy provisions" (Pet's. brief p. 31); and (2) those that have to do "with Congress' desire to ensure uniformity of policy and political responsibility." (Pet's. brief p. 30). The Government's argument runs that the provisions of Title III are indeed capable of this division because the first group "derives directly from this Court's opinions in *Berger* [*Berger v. New York*, 388 U.S. 41] and *Katz* [*Katz v. United States*, 389 U.S. 347] while the latter finds no counterpart there" (Pet's. brief p. 31). This court in *United States v. United States District Court*,

disregarding them should be something other and less than suppression of the evidence gathered by the wiretap. The Government thus seeks to classify the provision of Title III into categories or levels of rights; some it deems to be equivalent to traditional Fourth Amendment concerns and others are not. The plain answer to this is that nothing in the statute, the congressional findings or history, nor the judicial interpretations, permits such gradations. No authoritative data supports the Government's theory of separateness. The contrary, we will show, is the fact.

In *Berger v. New York*, *supra*, this Court held the New York permissive eavesdrop statute (N.Y. Code Crim. Proc. §813-a) to be unconstitutionally broad in its sweep "resulting in a trespassory intrusion into a constitutionally protected area" and thus violative of the 4th and 14th Amendments. This Court condemned the New York statute's "blanket grant of permission to eavesdrop . . . without adequate judicial supervision or *protective procedures*." 388 U.S. at p. 60 (emphasis supplied). Title III represents the effort of Congress "to structure a limited system of wire surveillance and electronic eavesdropping within the framework of the 4th Amendment and the guidelines of *Berger*, *Katz* and other Supreme Court decisions for use by law enforcement officers in fighting crime." *United States v. Scott*, 331 F. Supp. 233, 239 (D.D.C. 1971). The provisions of the statute "track the constitutional requirements of particularity, judicial restraints and supervision, and the other protective procedures outlined by the Supreme Court in *Berger* and *Katz*."

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407 U.S. 297 (1972) implicitly disavowed that "*Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III." 407 U.S. 323.



*id.* (emphasis supplied). Although the authorization requirement of 2516(1) and the mandate in 2518(1)(a) for identification in the application (of the officer authorizing it) and a similar requirement by the terms of 2518(4)(d) for identification in the order are not specifically spelled out in *Berger*, *Katz*, and the other judicial precursors to Title III, they are unquestionably "protective procedures". These procedures<sup>14</sup> are so intricately a part of the basic 4th Amendment requirements of the statute that they cannot be subordinated to the constitutional values that they implement.<sup>15</sup> The legislative history tells us this, as well as the thoughtful pronouncements of the majority of the Federal Judiciary who have confronted the particular statutory violations here involved.

A detailed history of §§2516(1), 2518(1)(a) and (4)(d) is given by the District Court (Miller, J.) in this case. *United States v. Focarile*, *supra*; and,

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<sup>14</sup>"When matters of a person's privacy are involved, the Government should be required to adhere to the dictates of Congress. The citizen's right to be left alone demands strict compliance with the letter of this legislative proviso." *United States v. Fox*, *supra* note 11.

<sup>15</sup>Judge Sobeloff, writing for the Court below (4th Circuit) in the instant case (*United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972)) described the entire scheme of the act in the opening of the opinion: "Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. ['Act'], lays down a *stringent step-by-step procedure* that circumscribes and limits all electronic surveillance. . . ." *id.* at 523 (Emphasis supplied.) See also *United States v. Baldassari*, *supra* note 11 at p. 906; *United States v. Cihal*, *supra* note 9 at p. 266. Toward the end of his opinion, to emphasize the point, Judge Sobeloff said: "The statute imposes an overall ban on electronic surveillance except under certain circumstances pursuant to specific procedures—which are not mere technical steps along the way." 469 F.2d at p. 531.

see also the Circuit Court opinion, *United States v. Giordano, supra*, at pp. 526-527. Remarkably, the present wording of 2516(1), restricting the authorization to the Attorney General or to an Assistant Attorney General specifically designated by him, was first suggested by Herbert J. Miller, then Assistant Attorney General, Criminal Division, Department of Justice, in testimony given in May 1961 at hearing on S. 1495<sup>16</sup> before the *Subcommittee on Constitutional Rights of the Committee on the Judiciary, Wiretapping and Eavesdropping Legislation*. He testified that the Department felt that the authorization provision in S. 1495 was too broad (see footnote 16) and suggested that the range of officials who might authorize wiretaps be severely curtailed. In part, he said:

"I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any Assistant Attorney General whom he may designate. This would give greater assurance of a responsible executive determination of the need and justifiability of each interception."

Shortly, thereafter, on June 21, 1961, the Department of Justice submitted to Congress a proposed revision of S. 1495 which, for the first time, included precisely the same operative language as the present §2516(1). The language of this recommendation was incorporated in all

<sup>16</sup>S. 1495 was presented in the 87th Congress, 1st Session, in 1961. Section 4(b) of the bill, as originally proposed provided that:

"The Attorney General or any officer of the Department of Justice or any United States Attorney specially designated by the Attorney General, may authorize an investigative law enforcement officer of the United States or any Federal Agency to apply to a judge of competent jurisdiction for leave to intercept wire communications."



subsequent proposals and became part of S. 917 which contained the text of Title III as it was eventually enacted by the Congress. Senate Report 1097 (United States Code Congressional and Administrative News, 90th Congress 2nd Session, Vol. 2 (1968)) in referring to §2516(1) states:

“Paragraph (1) provides that the Attorney General, or any Assistant Attorney General of the Department of Justice specifically designated by him, may authorize an application for an order authorizing the interception of wire or oral communications. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen.” 1968 U.S. Code Cong. & Adm. News p. 2185.

In *Gelbard v. United States*, 408 U.S. 41 (1972), this Court was not faced with any of the questions involved in this case, nor with the construction of Title III; but it did, however, indicate that the Act, “authorizes” the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, *an approval that may not be given except upon compliance with stringent conditions*. 18 U.S.C. §2516, 2518(1)-(8).” 408 U.S. 46 (emphasis supplied). The respondents regard it as significant that this Court, in making the point that judicial approval to wiretap “may not be given except upon compliance with stringent conditions”, specifically referred to Section 2516, and

the subsections of 2518 which include the other provisions here involved. In urging that the authorization requirement of §2516(1) is one of the "stringent conditions" that must precede judicial approval to wiretap, and that in essence it is constitutional, we rely upon the opinion of the Circuit Court in this case. There, Judge Sobeloff said:

"Because of the delicate nature of the power to initiate electronic surveillance applications, the implementation was reserved to designated officials of a certain rank within the Justice Department." 469 F.2d at p. 527.

Restrictions upon the implementation of a power to lawfully intrude upon a constitutionally protected area necessarily become a definitive part of that power. Judge Sobeloff crystalized this reasoning later in the opinion when he said:

"... By making an official subject to the 'political process' publicly responsible for each and every wiretap, Congress sought to provide the individual with yet another safeguard to insure that the awesome power of electronic surveillance be exercised with circumspection." 469 F.2d at p. 528.

The Fifth Circuit case of *United States v. Robinson*, 468 F.2d 189 (5th Cir. 1972), was the first one to confront the questions in the instant case upon identical facts. Its description of the "concerns" that Congress addressed itself to in enacting §2516(1) is fully in accord with the expressions of Judge Sobeloff. The Court, after noting the portion of Senate Report 1097 dealing with §2516 (*supra*), said:

"By expressing its intention that only 'a publicly responsible official subject to the political process' could initiate a wiretap application, Congress wanted to make certain that every such matter

would have the *personal* attention of an individual appointed by the President and confirmed by the Senate. Its reasoning was that this narrow limitation to top department officials would (1) establish a unitary policy in the use of the awesome power conferred, and (2) require that power to be exercised with a circumspection reenforced by ready identifiability of he who was responsible for its use, thus maximizing the guarantee that abuses would not occur." 468 F.2d at p. 192. (Footnotes omitted.)

District Judge Miller in *Focarile, supra*, reached the identical conclusions about the exalted importance of 2516(1) in the legislative scheme of Title III, and he additionally perceived the inter-relationship of the provisions of 2518(1)(a) and (4)(d) to 2516(1):

"Placement of the authority to make the decision of whether or not to authorize an application for a wiretap in the highest level of government and in a publicly responsible official subject to the political process was accomplished by the specific language of §2516(1) which had been suggested by the Justice Department in 1961 and which was included in the major subsequent legislative proposals. It was realized, however, as time went on that §2516(1) dealt only with the *fact of authorization* of the application. As has been seen, subsequent proposals, bit by bit, added the requirement that *the person who actually authorized the application must be made known* to the judge to whom the application was submitted and to those others to whom the contents of his order would be disclosed (See §2518(4)(d), §2518(8)(d) and §2519(1)(f)). Knowledge by the judge, by the persons to whom the contents of the order would ultimately be disclosed, and Congress and the public as a whole through the Reports of the Director of the Adminis-

trative Office of the United States Courts provided for in §2519(3) were deemed to be necessary and appropriate to allow those concerned and interested the opportunity to fix the responsibility for the fact of the authorization of the application in a specific and identifiable person who is subject to the political process.

"The statutory scheme therefore sets up a two-step process. First, the application for the wiretap must be authorized by the Attorney General or by an Assistant Attorney General specifically granted authority to act by the Attorney General. Second, the identity of the person who authorized the application must be made known to the judge acting on the application and ultimately, through his order, to any person who is a party to a proceeding in which the contents of any intercepted communication or evidence derived therefrom are offered in evidence or otherwise disclosed in court. These two requirements are equally important in the legislative scheme. If the only important fact were that one of the persons given the power to act by §2516(1) had in fact authorized the application, it would not have been necessary to add the additional provisions of §2518 to require the identity of the acting official to be set forth in the application and order." 340 F. Supp. at pp. 1056, 1057. (Footnote omitted.)

The Ninth Circuit, in a more terse fashion stated the principle as follows:

"In sum, we hold that the identification requirements of §2518(1)(a) and (4)(d) complement the authorization requirement of §2516(1). Without the former, the latter would be meaningless. . . ." *United States v. Chavez*, 478 F.2d 512, 517 (9th Cir. 1973).

The authorization requirement (§2516(1)) is central to the Fourth Amendment protections in Title III; and is

not, as the Government claims, a peripheral provision, separable from "the constitutional interests at stake." (Pet's. brief p. 26) That this is so has been echoed again and again.<sup>17</sup> This was strongly emphasized by the Ninth Circuit in the opinion it rendered in the case of *United States v. King*, 478 F.2d 494 (9th Cir. 1973), where it was said:

"The Act and its legislative history make clear the purpose of the authorization requirement. [§ 2516(1)] Congress was well aware of the grave threat to the privacy of every American that is posed by modern techniques of electronic surveillance. S. Rep. No. 1097, *quoted in* 1968 U.S. Code Cong. & Admin. News 2112, 2154. While recognizing the importance of wire tapping in combating organized crime, *id.* at 2157-60, Congress was concerned lest overzealous law enforcement officers rely excessively upon such techniques in lieu of less intrusive investigative procedures. In order to insure circumspection in their use, Congress erected the elaborate procedural requirements for the initiation of wire taps described above. *See id.* at 1285-96. It was seen as a significant safeguard for the general public that applications for an order to intercept wire or oral communications must be passed upon before they may be presented to a court by 'a publicly responsible official subject to the political process'—either

<sup>17</sup>A correct view of the matter is that the legislative history of Title III reveals that Congress attempted to achieve, "... a carefully controlled balance between preventing indiscriminate wiretapping, in order to protect the rights of privacy in wire communications, and the need on appropriate occasions to intercept such communications as an important aid to law enforcement. Section 2516(1) was included as a vital part of this balance." *United States v. Vasquez*, *supra* note 9, at p. 537.

the Attorney General or an Assistant Attorney General of the United States. *Id.* at 2185.

"In our opinion, the purpose of this provision was not merely to assure a uniform policy in applying for wiretaps. The Act prescribes a policy: that wire-taps are not to be overused, but are to be confined to those cases of serious crimes in which it is necessary to use them. The Congress wanted each application passed upon by one of the highest law enforcement officials in the government, and it named them. The Congress expected them to exercise judgment, personal judgment, before approving any application. Routine processing by subordinates was not to be the approach. More responsibility than that which devolves upon any department head in any bureaucracy, that is, ultimate responsibility for what his subordinates do, was required." 478 F.2d at p. 503.

- B. The provisions of §§2515 and 2518(10)(a)(i) and (ii) of Title III clearly provide that suppression of the contents of the intercepted communication and evidence derived therefrom should be the remedy and sanction for violation of §2516(1) and §2518(1)(a) and (4)(d).**

Assuming, as the Government claims, that the requirements of §2516(1), §2518(1)(a) and (4)(d) are not intrinsic to Fourth Amendment "values" or "concerns",<sup>18</sup> the conclusion that the Government argues for still cannot be reached. The desired end (of the Government's argument) is that this Court should not authorize the sanction imposed in this case by the lower courts.

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<sup>18</sup>But see part A, *supra*.



Though the underlying premise is many faceted,<sup>19</sup> the recurrent theme of the Government is that suppression is the remedy for violations of the Fourth Amendment, but not for the statutory ones here involved. To the extent that the Government's reliance is placed upon an analysis and interpretation of §2515 and the provisions of §2518(10)(a)(i)-(iii), the argument is unsupportable. The respondents find it an impossible undertaking to follow the reasoning of the Government in this respect (Pet's. brief 33-39). We meet the argument by directing atten-

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<sup>19</sup>The Government's arguments are:

I. The remedy provisions of Title III, namely §2515 and §2518(10)(a)(i)-(iii), do not require the suppression of evidence under the facts of this case, because the statute, "orders suppression as the remedy for violations of Fourth Amendment rights and ... does not provide suppression as a remedy for defective processing of applications to courts" (Pet's. brief p. 34). This argument is developed in the Pet's. brief at pp. 33-39 (Part 1B).

II. The exclusionary rule was established to remedy violations of constitutional rights. It was subsequently extended to vindicate certain statutory violations of constitutional magnitude or those involving fundamental personal rights. Suppression is not dictated in this case because the Government's violations of the statutory commands of the Title III "are not Fourth Amendment requirements ... [and] have no substantial bearing on the defendant's personal rights." (Pet's. brief p. 43). This argument is made in Pet's. brief at pp. 40-46 (Part 1C).

III. The Justice Department procedures and policies that produced the statutory violations in this case (and many others) have now been amended. The Government is now following the law and will not breach it again. The sanctions imposed by the lower courts in this case should not be ratified because: (a) "there is no need for 'deterrence' against resort to similar procedures"; and (b) suppression here would require the exclusion of probative evidence in a large number of other criminal cases. (Pet's. brief p. 47). This argument is set forth in Pet's. brief at pages 46-50 (Part 1D).

tion to the clear and unambiguous language of the statutes:

18 U.S.C. §2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. §2518(10)(a) provides, in part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."



To make the argument the Government does, is to assert that these provisions don't mean what they say, or don't say what they mean. The Legislative History supports the clear common sense meaning of these provisions. The Senate report dealing with Section 2515 provides, in pertinent part, as follows:

"Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision of a state, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United States*, 58 S.Ct. 275, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States*, 60 S.Ct. 266, 308 U.S. 338 (1939).) . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., *United States Code Congressional and Administrative News*, Vol. 2 (1968), 2184, 2185.

Distilled of surrounding language, the report says that §2515 "applies to suppress evidence directly . . . or indirectly obtained in violation of the chapter." *Gelbard v. United States*, *supra*, also gives direction on the subject:

"Indeed, the congressional findings articulate clearly the intent to utilize the evidentiary prohibition of

§2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance. . . .

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"And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means of §2515, of the limitations upon invasions of individual privacy. . . .

\* \* \*

"Section 2515 is thus central to the legislative scheme. Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." 408 U.S. 48-50 (Footnotes omitted)

The same Senate report says in reference to §2518(10)(a)

"Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial, hearing or other proceeding in or before any court, department, officer, agency, regulating body or other authority of the United States, a state, or a political subdivision of a state may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515." S. Rep. No. 1097, 90th Cong. 2d Sess., *United States Code Congressional and Administrative News*, Vol. 2 (1968), 2195.

Perhaps the clearest exposition of the meaning of §2515 and the provisions of 2518(10)(a) is found in the language of Chief Judge Bazelon, when, speaking for the Court (District of Columbia Circuit) in the case of *In Re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), 146 U.S. App. D.C. 310, he said:

"First, §2515 describes in the most sweeping possible terms a prohibition against the use of

evidence tainted by an unlawful wiretap. But the section gives no indication of a specific remedy by which this prohibition is to be enforced. Viewed as a whole, however, the Omnibus Crime Control Act does provide such a remedy—the motion to suppress authorized by §2518(10)(a). Moreover, the committee report which accompanied the Act explicitly indicated the committee's expectation that §2518(10)(a) would be read as the remedy for, and hence limitation on, the 'right' created by §2515." 452 F.2d 1243-1244 (Footnote omitted).

In the instant case Judge Miller of the District Court, felt that it was not necessary to decide the question raised under §2516(1). *Focarile, supra*. He ruled that, "the motions to suppress must be granted because both the application for the wiretap and the order of the issuing judge state that Will Wilson, an Assistant Attorney General specially designated for the purpose by the Attorney General had been the one to authorize the submission of the application to the Court" 340 F.Supp. at p. 1059. Thus his ultimate ruling of suppression was solidly and singularly put upon the violations of §2518(1)(a) and (4)(d).<sup>20</sup> The basis for suppression, in his view, existed solely in the specific provisions of

<sup>20</sup>This is abundantly clear by the following passage:

"If the application and the order of court granting leave to institute the wiretap were allowed to stand, in spite of the fact that they did not correctly identify the person authorizing the application as required by the statute, one-half of the two-prong statutory scheme would be rendered a nullity. Such a gross error cannot be relegated to oblivion by terming it a 'mere technicality' as the Assistant United States Attorney does in his understandable last-ditch effort to preserve his months of work on this case. The statute imposes an overall ban on the interception and disclosure of wire or oral communications, but, under a system of strict

## § 2518(10)(a)(ii):

"Section 2518(10)(a)(ii) provides that a motion to suppress may be granted if the order '... is insufficient on its face.' If the order in this case had failed to identify the person who authorized the application, it would have been defective and insufficient on its face and certainly would have justified suppression of any evidence derived from the wiretap. In the view of this court, the misidentification of the person authorizing the application is no more a 'technicality' than a failure to identify anyone, and similarly requires the granting of the motions to suppress.

"The application and order relating to the extension of the wiretap are defective for the same reasons as the original application and order." *id.* at p. 1060.

The Circuit Court in this case, as noted earlier, focused primarily on the violation of § 2516(1), and found that this in combination with the violations of the identification requirements of 2518(1)(a) and (4)(d) constituted "defects" that "go to the very heart of Title III." *Giordano, supra* at p. 531. It was obvious to the Circuit Court that the sanction unequivocally established in § 2515, implemented by the provisions of § 2518(10)(a)(i) & (ii), demanded suppression in this case. In sum, the Court said:

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judicial supervision, it authorizes interception under certain circumstances in connection with the investigation of particularized serious crimes by certain law enforcement officers. As was stated in *United States v. Cox, supra*, 'If the officers have not complied with the strict requirements of the statute, the contents of the communication or evidence which stems from it can be suppressed. ...' 449 F.2d at 684." 340 F. Supp. 1060.

"If the order had failed to identify the person who authorized the application, it would have been insufficient on its face, requiring suppression of the evidence. Here, however, there was no authorization at all, which is the equivalent of failing to identify anyone. Furthermore, the pattern of the Government's behavior in ignoring statutory requirement after statutory requirement necessarily leads to our determination that any communications derived from the wiretap were unlawfully intercepted and therefore properly suppressed." 469 F.2d 531.

The Government meets the reasoning of the courts below, as it is premised on § 2518(10)(a)(ii) (suppression on the grounds that the order under which the interceptions were made is insufficient on its face), by arguing that an order is not insufficient, if the defect is discovered by looking behind its face (Pet's. brief p. 37). An invalid order may facially appear to be valid; or an insufficient order may appear on its face to be sufficient. Is it any less invalid or insufficient because it appears not to be so? The closest analogy that can be drawn is in search warrant procedures and the requirements of affidavits supporting them. Rule 41(c), Federal Rules of Criminal Procedure<sup>21</sup> provides that a warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant; and that the warrant shall state the grounds of probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. The provisions of § 2518(1) prescribe counterpart requirements, with additional "protective pro-

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<sup>21</sup>Prescribed by this Court and made effective after submission to Congress. *Rea v. United States*, 350 U.S. 214, 217 (1956).

cedures" in respect to wiretapping under Title III— notable are the identification requirements. Nonetheless, the remedy and sanction portions of the search and seizure rule (41(e)) provide that a ground for suppression is that "(2) the warrant is insufficient on its face." It has been consistently held that false facts in a warrant application as to the identity of the affiant will vitiate the warrant and the search. *King v. United States*, 282 F.2d 398, 400, n.4 (4th Cir., 1960); *United States v. Upshaw*, 448 F.2d 1218, 1221 (5th Cir. 1971) (and especially see cases and authorities therein cited at n.3); *United States v. Carignan*, 286 F.Supp. 284 (D. Mass. 1967); *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968). The provisions of § 2518(10)(a)(ii) are remarkably similar to Rule 41(e)(2) in that both require suppression where the authority for the intrusion, warrant to search in one case and interception order in the other, is "insufficient on its face." Purged of its erroneous and "misleading" statements concerning the identification of the official authorizing the application, the order was "insufficient on its face." We do not see how the Government can claim otherwise.

Similarly, we cannot here depart from the other predicate for suppression asserted by the Circuit Court, i.e., that "the communication was unlawfully intercepted" (§ 2518(10)(a)(i)); and that the contents and its derivatives must be suppressed in the setting of the multiple violations of Title III. Many of the other courts that have reached a similar result on identical facts have not been as expansive or as articulate in their reasoning. See for example, *United States v. Baldassari*, 338 F.Supp. 904, 907 (M.D. Pa., 1972); *United States v. Cihal*, *supra*, 336 F.Supp. 261, 267 (W.D. Pa., 1972). This gives no cause for wonderment, because the clear application of § 2515 and § 2518(10)(a) need not be belabored. When Government officials attempt to disclose information derived from wire communications intercepted without

obtaining the authorization required by §§2516 and 2518(1) through (8), the evidentiary sanctions of §2515 become operative. *In re Egan*, 450 F.2d 199, 218 (3rd Cir. 1971) (Rosenn, Circuit Judge, concurring).

- C. The courts below did not invoke a judicially created exclusionary rule in reaching the result of this case, for Title III is self-executing in terms of remedy and sanction by virtue of §2515 and §2518(10)(a)(i) & (ii).

Ignoring the provisions of §2515 and 2518(10)(a), which together mandate suppression in this case, the Government next argues that the "judicially created exclusionary rule" should not be applied because there was no infringement of any substantial right of the defendants. The respondents are not aware that any "judicially created" exclusionary rule was invoked by the Courts below. A reading of the argument offered by the Government in support of this contention makes it clear why the Government transforms the statutory sanction, above noted, into a judicial one. By doing so, the Government can readily fall back on its overworked claim that the statutory requirements breached in this case are not rights protected by the Fourth Amendment. The Government is persistent in its claim that the statutory rights created by 2516(1) and 2518(1)(a) & (4)(d) are only procedural provisions, which have no bearing on the defendant's personal rights. Upon this weak foundation the Government builds its argument: (1) the exclusionary rule was established to remedy violations of constitutional rights; (2) it was subsequently extended to certain statutory violations under the supervisory power of this Court. (Pet's. Br. p. 40) Only in cases involving a statutory violation of constitutional, or near constitutional magnitude has this Court found an overriding



public policy warranting suppression, argues the Government. For this proposition the Government recites two general categories: first, those related to Fourth Amendment rights of privacy, exemplified by the interpretation of Section 605 of the Communications Act of 1934 (*Nardone v. United States*, 302 U.S. 379 (1937) & 308 U.S. 338 (1938)); the principle of *Katz v. United States*, *supra*; and the instances where there have been violations of 18 U.S.C. 3109 (*Miller v. United States*, 357 U.S. 301 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968)); and secondly, "those reflecting Fifth and Sixth Amendment values", as illustrated by *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957) (which involved the violation of a Federal Rule of Criminal Procedure); and *Miranda v. Arizona*, 384 U.S. 436 (1966) (Pet's. Br. pp. 42-43 n.30). The distinguishing factor between the cases the Government uses as illustrations in the two categories noted above, and the instant case is that here, Title III is self-executing as to remedy. In the cases cited by the Government, this Court was obliged to apply the exclusionary rule in the absence of an explicit remedy in the statutory scheme creating the right. Congress has declared in Section 2515 and Section 2518(10)(a) what the penalty should be for the statutory violations existing in this case. There was no necessity for the courts below to fashion a remedy. They utilized the one that was provided in the statute.

The Government, having established argumentatively to its own satisfaction that the violations of statutory requirements, such as the ones here involved, are not of constitutional magnitude—not warranting suppression—then embarks upon a review of the authorization and identification procedures in this case to prove its point. This argument is typically circular. It says that failures in the Department's preliminary screening of the applica-



tions are irrelevant, so far as the defendant's rights are concerned. Even so, the Government continues, the screening and review were comprehensive. (Pet's. Br. p. 44-46) Extensive as it may have been, and the respondents concede that it was, it nonetheless was not that demanded by the statute. The statute does not give the Government leave to provide substitute authorization and identification methods, no matter how comprehensive. When the Executive Branch of Government does something different than the Legislative Branch mandates, the Executive arrogates an authority it does not have. The danger always is, as shown by the record in this case, that there will be a dilution of the standards prescribed by Congress. It can only be said in such instances that the Executive Branch is either rewriting legislation or is ignoring the congressional will. This is administrative legislation—intolerable under the constitutional doctrine of separation of powers.

- D. The remedy provisions of Title III that mandate suppression of evidence in this case are not dependent or conditioned upon a later correction of the statutory violations nor upon the doctrine of retroactivity nor upon the number of prosecutions that cannot be maintained.

Finally, in the last section of its argument addressed to the theme that "suppression is a drastic remedy", the Government ties together what it calls, "still other considerations." In order, they are: (1) the Department of Justice changed the procedures under attack more than a year after the transgressions, thus, there is no need for deterrence; (2) suppression would result in the exclusion of basic and critical evidence in a large number

of criminal cases. (Pet's. Br. p. 47) To validate the first part of this argument, the Government again suggests (by a reference to *Terry v. Ohio*, 392 U.S. 1 (1968); *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Linkletter v. Walker*, 381 U.S. 618 (1965), that in this case we are dealing with the judicially created exclusionary rule. To the Government the cases it cites hold that the principal justification for the exclusionary rule is that suppression is the only effective way to deter the improper conduct in question.<sup>22</sup> Continuing this case because the practices that caused the violations have been amended and will not be repeated. This position, as noted, proceeds from the faulty premise that the suppression rulings by the courts below were an invocation of the "exclusionary rule". This, as we have pointed out, again and again, simply is not so. We could not have stated the position of the respondents more cogently in refutation of the "deterrence" and the "exclusionary rule" arguments of the Government, than was said in the case of *United States v. Wierzbicki*, *supra*, where the Government made similar arguments in a similar case:

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<sup>22</sup>We do not feel it appropriate to debate the question of whether deterrence is or is not the principal justification for the exclusionary rule. We only note what Justice Frankfurter said, in speaking for the majority of this Court, in *Jones v. United States*, 362 U.S. 257 (1960):

"The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy." 362 U.S. at p. 261.

"The Government also argues that, even assuming that the authorizations were improper, the Court should not invoke the 'drastic remedy' of suppression. It claims that no real deterrent effect would result from suppression, since the object of the Government was at all times to comply with the statutory requirements. *However, we are not dealing with the Court-fashioned 'exclusionary rule' involved in Fourth Amendment cases. Weeks v. United States*, 232 U.S. 383 (1914); *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1966). What we have here is a separate statutory requirement which this Court has no authority to ignore. Sec. 2518(10)(a); Sec. 2515." 12 Cr.L. 2075. (Emphasis supplied)

The Government next says that this Court "[i]n exercising its power to determine whether to impose the sanction of the exclusion of evidence in this case" (Pet's. Br. p. 48) should draw upon the factors illuminated in its retroactivity decisions, citing for this proposition the cases of *Linkletter v. Walker*, *supra*; *Stovall v. Denno*, 388 U.S. 293 (1967); *Desist v. United States*, 394 U.S. 244 (1969); and *Fuller v. Alaska*, 393 U.S. 80 (1968). Once more the Government makes an appeal that is based upon the faulty assumption that the "court-fashioned 'exclusionary rule'" is involved in this case. *United States v. Wierzbicki*, *supra*. The doctrine of retroactivity<sup>23</sup> espoused by

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<sup>23</sup>"Retroactivity" as a doctrine has a precise meaning which by definition renders it inapplicable to the facts in this case. In retroactivity cases, a party whose rights were finally concluded, adjudicated, or exhausted by an adverse rule or law seeks to have a later judicial change in the law applied retroactively to beneficially alter the result in his case. In the present case the petitioners asserted in the court of first instance that their rights had been violated by the conduct of the Government in disregard of

the Government is accommodated to this "exclusionary rule." The petitioners respectfully say that this Court cannot ignore that the remedy and sanction applied in this case exist as an integral part of Title III. This Court must, as the lower ones did, take the Act as it is. The Government invites this Court to exercise a power that it does not have.

The very last argument that the Government makes on this subject is that there was reliance by law enforcement authorities on the former procedures, resulting in a number of pending criminal cases and that if the judgment of the lower court is not reversed the administration of justice will be seriously affected. This argument too depends on the retroactivity doctrine for its vitality.<sup>24</sup> Because the underlying premises are inapplicable in this case, the conclusion must be rejected. This, notwithstanding, one thing further is to be said in answer to the notion that if this case is not reversed then many other criminal cases cannot be prosecuted. In *State v.*

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authorization and identification requirements in Title III; and that, accordingly, they were entitled under the Act to have the evidence gathered by the wiretap and derived from it suppressed. The first court agreed and granted them the appropriate relief, as did the Circuit Court, upon direct appeal. At every level of this ongoing, viable litigation the petitioners have asserted the same claim. At no point has the matter been adjudicated against them.

<sup>24</sup>The syllogism is as follows: A. In *Linkletter v. Walker*, *supra*, it was held that this Court has the power to decide which rulings (of even Constitutional dimensions) should be applied retroactively. B. In *Stovall v. Denno*, *supra*, this Court enumerated the controlling criteria in making this judgment, two of which are: "(b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards." (Pet's. Br. p. 49)

*Carluccio*, 61 N.J. 178, 280 A.2d 853 (1971), the Court said:

"Our system of justice is not disgraced by the acquittal of a defendant because illegally seized evidence cannot be used against him. I believe our system is ennobled by this rule. Judges uplift our system to the degree in which constitutional rights are enforced in a full and sympathetic spirit. Nor is the public uniformly dismayed by the discharge of an accused when the law requires that result." 280 A.2d at p. 857.

## II.

### THE STRINGENT REQUIREMENTS OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 WERE NOT ADHERED TO BY THE GOVERNMENT IN OBTAINING THE WIRE INTERCEPTION ORDERS HERE IN QUESTION.

The Government's Petition for a Writ of Certiorari correctly sets forth the second circuit cases<sup>25</sup> which are in conflict with the fourth circuit's opinion in the instant case.<sup>26</sup> The *Pisacano* case is factually more similar to this case than is the *Becker* case and, in fact, *Becker* is distinguishable so much so that it may stand alone from *Giordano* and *Pisacano* in a discussion of the §2516(1) requirements of 18 U.S.C. In *Becker*, the court found that the original application for a wiretap order had been personally approved by the then Attorney General of the United States, John N. Mitchell. The memorandum from the Attorney General to the Assistant Attorney General,

<sup>25</sup>*United States v. Pisacano*, 459 F.2d 259 (2d Cir. 1972); and *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972).

<sup>26</sup>*United States v. Giordano*, *supra* note 15.

Will Wilson, bore the Attorney General's initials, but those initials had been placed there by the Attorney General himself, which, strange as it may seem, is an exception to the norm. In this memorandum, the Assistant Attorney General, Wilson, was purportedly specially designated pursuant to 18 U.S.C. §2516 to authorize the attorney in charge of the Organized Crime and Racketeering Section of the Department of Justice to apply to the District Court for an order permitting the interception of wire communications on two specific telephones. In a manner similar to the manner in which the *Pisacano* and *Giordano* authorizations were handled, the actual authorization in *Becker* was issued not by Will Wilson, the Assistant Attorney General, but by Henry E. Petersen, then Deputy Assistant Attorney General, acting with Wilson's prior authority, expressly permitting him to sign Wilson's name to such authorizations. In *Pisacano* and *Giordano*, the original applications were approved not by the Attorney General himself, nor by an Assistant Attorney General specially designated, but by the Executive Assistant to Attorney General Mitchell, Mr. Sol Lindenbaum. (App. 96-97). In response to each application in these cases, the Attorney General's initials were placed on a memorandum to Assistant Attorney General Will Wilson, by Mr. Lindenbaum "specially designating" Mr. Wilson to authorize the appropriate field representative to apply for a wire communications interception order. As in *Becker*, the "Will Wilson letters" were neither signed nor reviewed by Wilson, but were actually issued by Petersen in *Pisacano*, and Deputy Assistant Attorney General Harold P. Shapiro in *Giordano*. In *Pisacano*, there were similarly two extension orders, each of which was personally authorized by Attorney General Mitchell, just as the wiretap and pen register extension

orders in *Giordano* were so authorized. However, these authorizations took the form of the memorandum to Will Wilson in the *Becker* case (App. 98-99). Such a memorandum purportedly specially designated "Assistant Attorney General Wilson to issue an authorization". It is undisputed, however, as in all the cases thus far mentioned, that Wilson did not issue such extension authorizations but that they each were issued by a Deputy Assistant Attorney General.

In *Giordano*, the sworn application of Assistant United States Attorney Francis S. Brocato for an order authorizing the interception of wire communications sets forth to Chief Judge Edward S. Northrop of the United States District Court for the District of Maryland, the fact that the application has been properly authorized by a specially designated Assistant Attorney General and further identifies the purported specially designated Assistant Attorney General as the Honorable Will Wilson. Annexed to the application of Mr. Brocato were the "Will Wilson letter" to Mr. Brocato, and the affidavits of two special agents of the Bureau of Narcotics and Dangerous Drugs (BNDD). (App. 21-48). Judge Northrop's subsequent order mistakenly stated that the authorizing party was, in fact, Assistant Attorney General Will Wilson. (App. 49-51). It is also evident that Chief Judge Northrop was totally unaware that the original authorization was neither reviewed nor issued by the Attorney General of the United States nor any specially designated Assistant United States Attorney, but by the Attorney General's Executive Assistant. The order was valid for a twenty-one day period after which it would expire. On the twenty-first day, the Assistant United States Attorney filed an application for an extension of the October 16, 1970 order (App. 60-81), which included a second "Will Wilson letter" and an affidavit from a supervising agent of



the Bureau of Narcotics and Dangerous Drugs. The second application likewise incorrectly states that the Attorney General has "specially designated" Assistant Attorney General Will Wilson to authorize the application in question. The affidavit accompanying the application for a wiretap extension order recited at length the fruits of the defective October 16 order as a substantial portion of the underlying reasons for granting the extension for an additional period of time. On November 6, Chief Judge Northrop was again duped into passing a defective wiretap order, wherein he attempted to comply with the requirements of § 2518(4)(d) of 18 U.S.C.<sup>27</sup> by stating that the application was authorized by the specially designated Assistant Attorney General, Will Wilson.

As is stated in the fourth circuit opinion of the late Senior Circuit Judge Sobeloff, the issue presented in this case is "... the extent to which the Government must adhere to the letter of that statutory scheme (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq.) in authorizing applications and obtaining orders permitting the interception of wire communications." *United States v. Giordano, supra*, at p. 523. Defendants take issue with the Government's initial strained assertion that it "... complied with the provisions ... of Title III." (Pet's. Brief, p. 52). Judge Sobeloff's capsulation of the issue proves this statement to be utterly beyond the real facts at hand.

The order authorizing the application for the interception of wire communications was not properly

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<sup>27</sup> 18 U.S.C. § 2518(4)(d) provides in pertinent part:

"Each order authorizing or approving the interception of any wire or oral communication shall specify:

(d) the identity \* \* \* of the person authorizing the application; \* \* \*"



authorized in accordance with §2516(1) of 18 U.S.C. and the identity of the person authorizing the application was neither made known to Chief Judge Northrop nor did his orders (including the November 6, 1970 extension order) correctly identify the persons authorizing either the first or second applications.

**A. The wire communications interception order issued by Chief Judge Northrop was defective in that the application for such order was not validly authorized.**

Section 2516(1) of Title 18 U.S.C. provides in pertinent part:

"The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with Section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . . ."

That the Government failed to comply with the provisions of this section is evident from the facts, recited above, and contained in the affidavits of Sol Lindenbaum (App. 96-97), Harold P. Shapiro (App. 100-101) and the pertinent parts of the transcript of the hearing before District Judge James R. Miller on Defendants' Supplemental Motion to Suppress (App. 102-107).

The Government concedes that Mr. Lindenbaum alone authorized and issued the memorandum of approval for the initial application (App. 98) and that he placed thereon the Attorney General's initials. The procedures followed in this case, as set forth by Judge Sobeloff, included a request for authorization by the Director of the Bureau of Narcotics, and subsequent review and

favorable recommendation of this application by the Deputy Chief and Chief of the Organized Crime and Racketeering Section of the Department of Justice and the Deputy Assistant Attorney General. The Attorney General never delegated his authority in this regard (App. 96, 103, 105); accordingly, all applications for wiretap authorizations under §2516 were referred to the Attorney General. When the October 16, 1970 application was submitted, the Attorney General was absent from Washington and the application was reviewed by his Executive Assistant, Mr. Lindenbaum. According to the Lindenbaum affidavit, Lindenbaum reviewed the request for approval and concluded from his knowledge of the Attorney General's previous actions in similar matters that the Attorney General would favor granting the request (although in the same defective manner theretofore employed, contrary to §§2516 and 2518). Lindenbaum therefore acted, in the Attorney General's absence, to approve the request by signing the Attorney General's initials to a memorandum to Assistant Attorney General Will Wilson, designating him to authorize a tap on Giordano's telephone.

In plain view of these facts, the Government again advances what has been characterized as its "alter ego theory", seeking to convince this Court, although unsuccessful below, that compliance with alleged policy objectives of responsibility for wiretap authorizations is full compliance with the law. In urging on the Court its contention in this regard, it seeks to sweep under the rug of confusion its hazy notion that Congress intended to allow wiretap authorizations to be issued within the Attorney General's policy guidelines and created, as a check on the issuance of such privacy invading authorizations, the sheep in wolf's clothing of holding the Attorney General responsible for all such actions. It is

further suggested that by in effect, allowing delegation of duties in the manner allowed by 28 U.S.C. § 510,<sup>28</sup> while prohibiting the companion delegation of responsibility, the § 2516(1) alleged primary legislative purpose—that a line of responsibility lead to a clearly identifiable person—is met.

In responding to the “alter ego theory” advanced below, Judge Sobeloff supplies a thorough analysis of the pertinent legislative history of § 2516 itself. Indeed, it was on the specific recommendation of the Assistant Attorney General of the Criminal Division of the Department, Herbert J. Miller, himself, that language allowing authorizations to apply for written orders to be issued by “... any Assistant Attorney General of the Department of Justice ...” (in addition to the Attorney General or an Assistant Attorney General specially designated by him) was removed from the proposed legislation. *United States v. Giordano, supra*, at p. 526-527. The Government’s basic responsibility and centralization of control argument here advanced was summarily rejected by Mr. Miller and ultimately by Congress, who, in response to Mr. Miller’s suggestion that such power of authorization be vested only in the “Attorney General and any Assistant Attorney General whom he may designate” revised the legislation to its present form, as it exists in § 2516. In his testimony Mr. Miller further indicated:

“*This would give greater assurance of a responsible executive determination of the need and*

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<sup>28</sup>28 U.S.C. § 510 provides:

“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”

*justifiability of each interception.*' *Id.* (Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Wiretapping and Eavesdropping Legislation*, 87th Congress, First Session (May 9, 10, 11, 12, 196(1)) at 356." (Emphasis added) *Id.* at p. 527.

Although the Government suggests that delegation to the Executive Assistant of the Attorney General would satisfy the announced objectives of Mr. Miller's testimony, the above quoted passage clearly indicates the contrary; it was Mr. Miller's suggestion, later adopted by Congress, that each authorization be the subject of a responsible executive determination, a quality which is lost if delegated to an office assistant.

In seeking to properly interpret §2516, the vast majority of well reasoned cases, including *United States v. Giordano*, *supra*, seek guidance from Senate Report 1097, dated April 29, 1968, which accompanied Senate Bill 917 (containing §2516 of 18 U.S.C.), found in *United States Code Congressional and Administrative News*, 90th Congress, Second Session, Vol. 2 (1968). See *United States v. King*, *supra*. But see, also, *United States v. Pisacano*, 459 F.2d 259, 262 and 264 (2d Cir. 1972).

Senate Report 1097 states, inter alia, in referring to §2516, that it is the Congressional intent in employing the specific terminology used, to limit the initiation of a wiretap to "a publicly responsible official, subject to the political process." As pointed out by Judge Sobeloff below, Mr. Lindenbaum is not such an official subject to the political process.

In *Pisacano*, Judge Friendly interprets the language of Senate Report 1097 to require "responsibility" to remain in such an official regardless of what member of the Department of Justice issues the particular interception

order in question. To this "responsibility" theory, likewise espoused by the Government, Respondents reply that it ignores the complete legislative history, discussed above and in *Giordano*, and it ignores some of the specific limiting language of §2516 itself. In its argument here, the Government is also reaching out to frantically incorporate a more general, permissive statute into §2516(1); namely, 28 U.S.C. §510.<sup>29</sup> That latter section was in existence prior to the enactment of 18 U.S.C. §2516 and generally authorizes the Attorney General to delegate his functions to any other officer, employee or agency of the Department of Justice. Were this Court to adopt this outrageous theory so advanced, it would be abandoning all rules of statutory construction. Chief Judge Friendly, in *Pisacano*, suggests that the legislative history may well be doubtful in establishing the true intentions of Congress meant to be expressed in §2516. However, in order to reach the conclusion suggested by *Pisacano*, one must regard the statutory language "... or any Assistant Attorney General specially designated by the Attorney General ..." (18 U.S.C. §2516(1)) as meaningless surplusage. For if the Attorney General may delegate his functions to any officer, employee, or agency of the Department of Justice, it must necessarily follow that he could designate any one of them for the function in question, a result in direct conflict with this language of §2516. The Congressional design, evidenced by the above quoted statutory terminology, would be thwarted. Additionally, Judge Sobeloff's observation of the result of such a conclusion is appropos:

"If we should accept the Government's reasoning, there can be no assurance that in some future case,

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<sup>29</sup> See footnote 28, *supra*.

if the particular wiretap authorization proved politically embarrassing, the Attorney General would not then repudiate his 'Lindenbaum'. The Attorney General would always be able to say with the benefit of hindsight that the subordinate had betrayed his confidence, acted beyond the scope of his responsibility, and the actions taken were not those of an agent. The alter ego theory destroys the concept of establishing identifiable individual responsibility at a certain level of government." *United States v. Giordano*, supra, at pp. 528-529.

Finally, an argument similar in nature and scope was advanced by the Government in *United States v. Aquino*, 338 F. Supp. 1080 (E.D. Mich. S.D. 1972). In responding to that argument, that Court stated:

"In the Court's opinion, however, when Congress stated in Section 2516 that the power to authorize applications to a Federal judge was given to 'the Attorney General, or any Assistant Attorney General specially designated by the Attorney General', it excluded designation of or delegation to all other persons. It is a long recognized rule of statutory construction that where one statute contains a specific provision or direction, as does Section 2516, and another statute dealing with the same or similar subject matter contains a more general provision or direction, as that contained in Section 510 and the regulation enacted thereunder, the particular or specific provisions must control. 'Specific terms prevail over the general in the same or another statute which might otherwise be controlling'. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229, 77 S.Ct. 787, 791, 1 L.Ed.2d 786 (1957), quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932). A related rule of construction holds

that the enumeration of certain things in a statute implies the exclusion of all others. As was stated by the Supreme Court in *Continental Casualty Co. v. United States*, 314 U.S. 527, 533, 62 S.Ct. 393, 396, 86 L.Ed. 426 (1941): '[A] "legislative affirmative description" implies denial of the non-described powers.' Applying these rules to the statutes here under consideration, it can only be concluded that the specific language of Section 2516 must take precedence over the general provisions of Section 510 and that the express limitations in Section 2516 preclude any inclusion of persons not specifically mentioned. [Footnote omitted, referring to the *United States v. Robinson*<sup>30</sup> suggestion that if 28 U.S.C. Section 510 allows delegation of Section 2516 authorization functions, then statutory reference to "any Assistant Attorney General specially designated by the Attorney General" would have been surplusage.] Only the Attorney General or an Assistant Attorney General specially designated by the Attorney General may authorize an application to a Federal Judge for an order approving a wire interception." *Id.* at pp. 1082-83. (Emphasis in original).

In a desperate effort to locate some firm support for its contention that the Attorney General could have properly delegated the authorization function, the Government quotes from *United States v. Barnes*, 222 U.S. 513, 520, 56 L.Ed. 291, 32 S.Ct. 117 (1912), that where there is subsequent legislation upon a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. It is submitted that the

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<sup>30</sup>468 F.2d 189 (5th Cir. 1972) rehearing en banc granted; remanded for further hearing in 472 F.2d 973 (5th Cir. 1973).

language of §2516 clearly is exclusive in meaning, as argued above. Additionally, reliance on this language is misplaced; not only is §2516 contained in a different Title (Title 18) than §510 (Title 28), but also Congress was not reinforcing an existing wiretap statute which already contained the generally worded §510. No Congressional intention to permit general delegation of the authorization function can properly be read into the procedural statutory scheme when it clearly did not necessitate any special further limitation. The §2516 language is limiting in character, standing alone.<sup>31</sup>

It is inaccurate, misleading and inappropriate for the Government to suggest, as it does, that "some room must have been left to the Attorney General to delegate the authority to approve specific applications" (Pet's. Brief, p. 62) since §2516 was enacted "against the background of Sections 509 and 510"; §2516 does not prohibit delegation, but on the contrary, it expressly allows for it. Keeping in mind the avowed intent to confine such intrusive activity in "publicly responsible official(s) subject to the political process", Congress, recognizing the possibility that future proliferation of wiretap applications could easily result in the inundation of the Attorney General in a sea of such applications, provided for him to specially designate his Assistant Attorneys General, of whom there are nine. Thus, Congress did not prohibit delegation altogether, as the Government suggests must be the only alternative to a finding of the inapplicability of the general delegation statute, 28 U.S.C. §510. The Government's reasoning

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<sup>31</sup>See *United States v. Mantello*, *supra* note 11, adopting the results and rationale of *United States v. King*, *supra* note 10, and *United States v. Giordano*, *supra* notes 15 and 26, and specifically rejecting *United States v. Pisacano*, *supra* note 25.



seeks to avoid the middle ground, which is in fact the reality, that Congress specified those few individuals in whom their intended limited delegation of the authorization function may be vested. Centralization of policy, centralization of responsibility and use of publicly responsible officials subject to the political process were all requisites, just as the Congressional limitation on the maximum number of individuals in whom the authorization function would be allowed to be placed. In short, the Government would here urge that the last two requirements be relaxed, attempting to convince the Court that responsibility is the crucial factor. Were the Court to adopt such a position, §2516 would, in effect, be judicially modified.

The Government next contends that delegation in this case should be sustained on a showing of "exigent circumstances". What the Government is really requesting is that the Attorney General be excused for failing to avail himself of the Congressional suggestion that he specially designate Assistant Attorneys General to carry out the authorization function. The loss of the alleged elusive and evanescent telephone conversations should lie squarely on the shoulders of the Attorney General who failed to exhibit the foresight of realizing that a request may be received by the Department of Justice at a time when he was unavailable and likewise when he had not yet specially designated an Assistant Attorney General to act, in accordance with the clear Congressional exclusionary mandate. Finally, the top legal official of the land should certainly have been aware of the illegality of an authorization emanating from his Executive Assistant, Lindenbaum, no matter how intimately involved he was with the functions of the Attorney General's office. Action by that individual on wiretap applications was simply unauthorized.

- B. The authorization to make application for an order to intercept wire communications, the application for such order and the order itself are all defective in that the true identity of the person responsible for initiating the wire communications interception is missing from each document.

The original authorization to make application for an order to intercept wire communications (the "Will Wilson letter", App. 25-26) falsely stated that the Attorney General had carried out the statutorily permissive special designation of an Assistant Attorney General empowering him to authorize the application for an order to intercept wire communications. The "Will Wilson letter" misidentified not only its author but the actual origin of the authorization. The latter was issued, it was discovered, pursuant to a memorandum to "Will Wilson, Assistant Attorney General", purportedly bearing the initials of the Attorney General, dated likewise, October 16, 1970 (App. 98), but actually initialed by Deputy Assistant Attorney General Shapiro. The memorandum initiating the subsequent chain of events, collectively comprising the authorization to make the application for an interception order, was never reviewed by the Attorney General, but, instead, only by his Executive Assistant, Sol Lindenbaum (App. 96-97). The application (App. 21-48) was presented to Chief Judge Northrop by Assistant United States Attorney Brocato. The application recited all of the false statements of fact contained in the supporting documents, above mentioned, and these intentional misstatements were finally cast in bronze when wholly incorporated in the Court's order of even date (App. 49-51).

An identical factual situation was aptly called an "elaborate paper charade" in *United States v. King*,

*supra*, while at the same time, concluding that it was carried out for the purpose of deceiving the Congress and the Courts.

Section 2518(1)(a) of Title 18, United States Code, commands:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, *and the officer authorizing the application;*" (Emphasis added).

Section 2518(4)(d) repeats the mandate that the person exercising the §2516 authorization function be specifically identified:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

\* \* \* \* \*

"(d) the identity of the agency authorized to intercept the communications, *and of the person authorizing the application;*" (Emphasis added).

In a red-faced attempt to calm the waves of embarrassment thrust at it by the discovery of deceitful procedures utilized by the Attorney General's office in obtaining interception orders, the Government again advances an argument, similar to its §2516 argument, that the statutory directives of §2518(1)(a) and (4)(d) do not mean what they say. The Government is again trying to market its "responsibility" theory. The Government attempts to brush aside the glaring defects caused by

Lindenbaum's action in place of the Attorney General's, the Deputy Assistant Attorney General's action in place of the purported special designee's, and the resulting identification deficiencies of the application and order of Court, by casually suggesting that the papers containing these false facts, the very foundation of the intrusive wire interception order, were merely "imprecise". In effect, the Government again submits the argument that the spirit, if not the letter of the law, was met. On close analysis, such an argument should be self defeating. The Government first suggests that §2516(1) allows the Attorney General to designate one not included in the statutory language as a possible designee to authorize wiretaps, namely, Sol Lindenbaum, Executive Assistant to the Attorney General (a minor deviation since the Attorney General will, of course, assume full responsibility for his every act); next, the Government suggests that no matter who, in fact, authorized the interception, the person responsible, namely the Attorney General, is the authorizing official sought by §2518(1)(a) and (4)(d) (a second minor deviation) since this is what Congress intended anyway. The Government argues that since misidentification does not taint the Court's findings of probable cause and necessity, and thus does not lead to Fourth Amendment Constitutional defects, statutory defects should be overlooked.

While Defendants would concede that the Constitution establishes the minimum requirements to be met in obtaining a valid interception order, Congress does not necessarily adhere to minimum standards in enacting legislation. Non-constitutional considerations, as well, may help to mold legislation. The procedures adopted by the Attorney General must pass both Constitutional and statutory tests of compliance. Thus, it necessarily follows that adherence to minimum Constitutional standards may

not be sufficient to resist a motion to suppress evidence. Here, the Government urges that these deviations from the unambiguous statutory requirements be overlooked. Evidence of Judge Becker's foresight of such a potential rolling snowball, as exhibited in *United States v. Narducci*, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972) and quoted with approval in *United States v. Giordano*, *supra*, is here pertinent:

"As we view it, the necessity for strict compliance with the statute in a wiretap situation stems just as much from the precedent-setting example of condoning laxity which could lead to further laxity in years to come, with serious consequences to personal liberties, as from concern over the rights of the accused in a given case."

Defendants contend that in this area of conduct which is intrusive and which steals from individuals much of their right to privacy, Congress intended form to be as important as substance. As Judge Becker in *Narducci*, *supra*, observed, at p. 1114:

"[T]he Government's contentions that Mr. Lindenbaum's role constitutes a fulfillment of statutory policy fail in a most significant respect. For, as we understand this unique area, Congress has made form as important as substance; Congress was concerned not just with the integrity of the internal Justice Department review of agency wiretap requests, but also with the identity and status of the person initiating the authorization to apply for court approval. While Congress conferred upon the Justice Department the *authority* to initiate the wiretap process, it is clear to us that it deemed *implementation* of that awesome power to be a matter of high national policy. Accordingly, the approval of Mr. Lindenbaum, not an official subject

to the 'political process', does not fill the congressional bill." (Emphasis in original).

Section 2518 twice commands, in subsections (1) and (4), that the identity of the authorizing party be given; identity of the authorizing person must be set forth in the report filed with the Administrative office and Congress. Much attention and effort seems to have been devoted to a matter which the Government contends is unimportant. See *United States v. Focarile*, *supra* at pp. 1054-55, for an analytical study of the conception and birth of the § 2518 identification requirements.

We are not unmindful of *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1973); and *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972), holding, in effect, that substance would prevail over form. Defendants submit that those respective courts were inclined to limit suppression of evidence to factual situations where the minimum Constitutional requirements were not met, and as a result, thwarted the additional Congressional designs to require further safeguards. Such a result amounts to a failure to give full recognition to the Congressional arm of our tripartite system, in a situation where the statutory directive passes Constitutional muster.

Lastly, it can hardly be seriously contended, as the Government attempts to do, that the so-called "paper charade" was not calculated to mislead the Court in considering wire interception applications. The memorandum initialed by Lindenbaum tracks the statute, instead of relating the true fact that the Attorney General had not reviewed the request for an authorization. Next, the "Will Wilson letter" tracks the statute instead of setting forth the genuine factual details of the identity of the authorization source. Clearly, these forms were created

for use in all subsequent wire interception requests so as to suggest, to the unwary, strict compliance with the Congressional mandate, certainly recognized by the Department of Justice prior to the exposure of this scheme of governmental trickery.

### III.

**THE APPLICATION FOR THE EXTENSION OF THE WIRE COMMUNICATIONS INTERCEPTION ORDER AND FOR THE EXTENSION OF THE PEN REGISTER ORDER WERE DEFECTIVE IN THAT THEY WERE BASED ON FACTS WHICH HAD BEEN OBTAINED PURSUANT TO A DEFECTIVE ORDER TO INTERCEPT WIRE COMMUNICATIONS.**

In an attempt to salvage some evidence against the Defendants, obtained through wire communications interceptions and court authorized pen register techniques, the Government contends that, even although the affidavits in support of said extension orders are based almost exclusively on information obtained, directly or indirectly, as a result of wire communication interceptions conducted pursuant to the October 16, 1970 order of Chief Judge Northrop, the fruits of the extension orders are admissible and should not have been suppressed.

Judge Sobeloff, below, affirmed Judge Miller's decision to suppress evidence obtained under the interception orders of this case, stating that the Court of Appeals was "... suppressing the fruit of the wiretaps in these cases." *United States v. Giordano, supra*, at page 531. Judge Miller had found that the subsequent extension orders were not supported by sufficient showings of probable cause since information from a defective Title III wiretap was used to obtain them. *United States v. Focarile, supra*, at page 1041.

The Government contends that its applications for extension orders for the interception and for the pen register contained, indeed "restated", all facts which were set out in the affidavit for the original order. Such is not the case. (App. 66). In fact, the affidavits recited, at length, the content of various communications, intercepted pursuant to the original wire communications interception order of October 16, 1970; the affidavits failed to set out any of the facts contained in the prior supporting documents, annexed to the original application, other than by a casual reference thereto. Although the affidavits do recite that a sale was made from Defendant Giordano to an undercover agent, that lone fact does not in itself establish probable cause for the issuance of the wire interception and pen register orders in question; on the contrary, recital of facts pertaining to an alleged sale constitutes a clear showing of the effectiveness of other law enforcement techniques and the absence of a *need* for a wire interception order. In short, the applications for the extensions did not include all details that were required by § 2518(1)(a) through (f), and accordingly, the extension orders were invalid.

In addition to the above defects, the application for the extension of the wire communications interception order was clearly defective as was the order itself, for failing to comply with the identification requirements of § 2518(1) and (4). This is so even though the Government affidavits, produced in response to Defendants' Motion to Suppress, showed that the Attorney General, John N. Mitchell, had himself reviewed the request for an authorization and had himself initialed the usual type of memorandum to Assistant Attorney General Will Wilson. The affidavits clearly show that although such an authorization was approved, Will Wilson was never specially designated to actually issue authorizations;



additionally, as has come to be the usual procedure in issuing such authorizations, the authorization in question, was, in fact, not issued by Will Wilson but was instead issued by Deputy Assistant Attorney General Shapiro. The application of Assistant United States Attorney Brocato likewise failed to state the true identity of the authorizing person or officer but instead identified Will Wilson as having authorized the application for a wire communications interception order when in fact, Will Wilson had no knowledge of either the original application or this application for an extension. As was argued above, this is not compliance with §2518 of 18 U.S.C. and any evidence secured under such an order was properly suppressed. Such evidence was, at best, the "fruit of the poisonous tree" since no other basis was even submitted for the consideration of Chief Judge Northrop in granting either extension order. Cf. *Nardone v. United States*, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266 (1939); *Ethridge v. United States*, 380 F.2d 804 (5th Cir. 1967). Accordingly, the Attorney General's alleged personal intervention did not purge all taints.

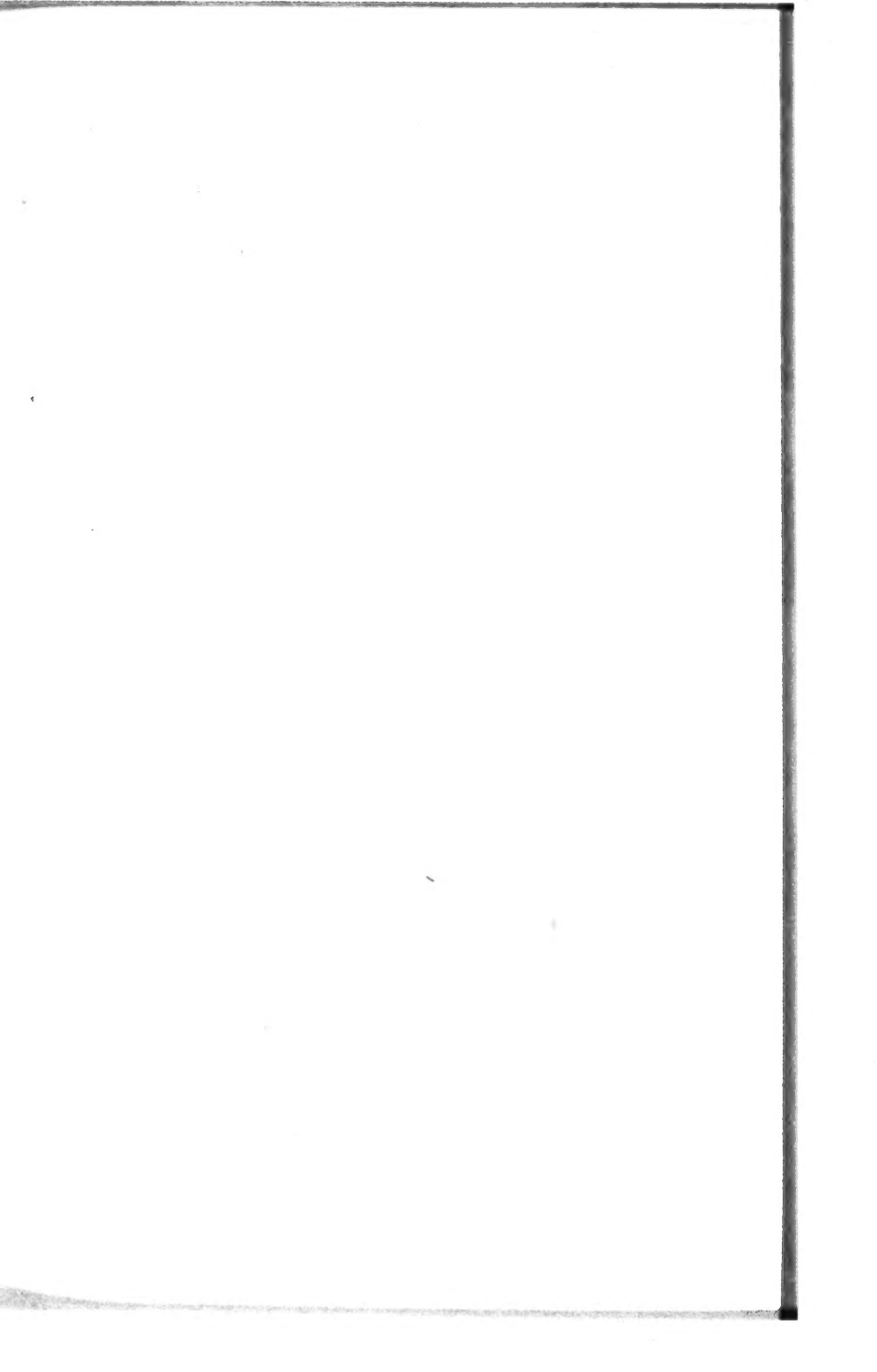
## CONCLUSION

For the above stated reasons, the judgment of the Courts below, suppressing the evidence in these cases, should be affirmed.

Respectfully submitted,

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## Syllabus

UNITED STATES *v.* GIORDANO ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

No. 72-1057. Argued January 8, 1974—Decided May 13, 1974

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides in 18 U. S. C. § 2516 (1) that "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses; and further provides that the contents of intercepted communications, or evidence derived therefrom, may not be received in evidence at a trial if the disclosure of the information would violate Title III, 18 U. S. C. § 2515, and may be suppressed on the ground, *inter alia*, that the communication was "unlawfully intercepted," 18 U. S. C. § 2518 (10)(a)(i). In this case an application purportedly authorized by a specially designated Assistant Attorney General for an order permitting the wiretap of the telephone of respondent Giordano, a narcotics offense suspect, was submitted to the Chief Judge of the District Court, who then issued an interception order, and later an extension order based on a similar application but also including information obtained from the previously authorized interception and extending the authority to conversations of additional named individuals calling to or from Giordano's telephone. The interception was terminated when Giordano and the other respondents were arrested and charged with narcotics violations. During suppression hearings, it developed that the wiretap applications had not in fact been authorized by a specially designated Assistant Attorney General, but that the initial application was authorized by the Attorney General's Executive Assistant and the extension application had been approved by the Attorney General himself. The District Court sustained the motions to suppress on the ground that the Justice Department officer approving each application had been misidentified in the applications and intercept orders. The Court of Appeals affirmed, but on the ground that the initial authorization violated § 2516 (1), thereby requiring suppression of the wiretap

and derivative evidence under §§ 2515 and 2518 (10) (a) (i), *inter alia*. *Held*:

1. Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. Pp. 512-523.

(a) Notwithstanding 28 U. S. C. § 510, which authorizes the Attorney General to delegate any of his functions to any other officer, employee, or agency of the Justice Department, § 2516 (1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate. Pp. 512-514.

(b) This interpretation of § 2516 (1) is strongly supported by the purpose of the Act effectively to prohibit all interceptions of oral and wire communications, except those specifically provided for, and by its legislative history. Pp. 514-523.

2. Primary or derivative evidence secured by wire interceptions pursuant to a court order issued in response to an application which was, in fact, not authorized by the Attorney General or a specially designated Assistant Attorney General must be suppressed under § 2515 upon a motion properly made under § 2518 (10) (a), and hence the evidence obtained from the interceptions pursuant to the initial court order was properly suppressed. Pp. 524-529.

(a) Under § 2518 (10) (a) (i) the words "unlawfully intercepted" are not limited to constitutional violations, but the statute was intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. Pp. 524-528.

(b) Since Congress intended to condition the use of intercept procedures upon the judgment of a senior Justice Department official that the situation is one of those warranting their use, thus precluding resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use, it is evident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored. Pp. 528-529.

3. Communications intercepted pursuant to the extension order were inadmissible, since they were evidence derived from the communications invalidly intercepted pursuant to the initial order. Pp. 529-533.

469 F. 2d 522, affirmed.

WHITE, J., delivered the opinion of the Court, in Parts I, II, and III of which all Members joined, and in Part IV of which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 580. POWELL, J., filed an opinion concurring in Parts I, II, and III of the Court's opinion and dissenting from Part IV, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 548.

*Solicitor General Bork* argued the cause for the United States. With him on the brief were *Assistant Attorney General Petersen*, *Harriet S. Shapiro*, and *Sidney M. Glazer*.

*H. Russel Smouse* argued the cause for respondents and filed a brief for respondent Giordano.

MR. JUSTICE WHITE delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U. S. C. §§ 2510-2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. The Court must here determine whether the Government sufficiently complied with the required application procedures in this case and whether, if not, evidence obtained as a result of such surveillance, under a court order based on the applications, is admissible at the criminal trial of those whose conversations were overheard. In particular, we must decide whether the provision of 18 U. S. C.

§ 2516 (1) <sup>1</sup> conferring power on the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses permits the Attorney General's Executive Assistant to validly authorize a wiretap application to be made. We conclude that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him and that primary or derivative evidence secured by wire interceptions pursuant to a court order issued in response to an application which was, in fact, not authorized by one of the statutorily designated officials must be suppressed under 18 U. S. C. § 2515 upon a motion properly made under 18 U. S. C. § 2518 (10)(a). Accordingly, we affirm the judgment of the Court of Appeals.

## I

In the course of an initial investigation of suspected narcotics dealings on the part of respondent Giordano, it developed that Giordano himself sold narcotics to an undercover agent on October 5, 1970, and also told an informant to call a specified number when interested in transacting narcotics business. Based on this and other information, Francis Brocato, an Assistant United States Attorney, on October 16, 1970, submitted an application to the Chief Judge of the District of Maryland for an order permitting interception of the communications of Giordano, and of others as yet unknown, to or from Giordano's telephone. The application recited that

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<sup>1</sup> This and other relevant provisions of the statute are contained in the Appendix to this opinion, *post*, p. 534.

Assistant Attorney General Will Wilson had been specially designated by the Attorney General to authorize the application. Attached to the application was a letter from Will Wilson to Brocato which stated that Wilson had reviewed Brocato's request for authorization and had made the necessary probable-cause determinations and which then purported to authorize Brocato to proceed with the application to the court. Also attached were various affidavits of law enforcement officers stating the reasons and justification for the proposed interception. Upon reviewing the application, the Chief Judge issued an order on the same day authorizing the interception "pursuant to application authorized by the Assistant Attorney General . . . Will Wilson, who has been specially designated in this proceeding by the Attorney General . . . to exercise the powers conferred on him by [18 U. S. C. § 2516]." On November 6, the same judge extended the intercept authority based on an application similar in form to the original, but also including information obtained from the interception already authorized and carried out and extending the authority to conversations of additional named individuals calling from or to Giordano's telephone. The interception was terminated on November 18 when Giordano and the other respondents were arrested and charged with violations of the narcotics laws.

Suppression hearings followed pretrial notification by the Government, see § 2518 (9), that it intended to use in evidence the results of the court-authorized interceptions of communications on Giordano's telephone. It developed at the hearings that the applications for interception authority presented to the District Court had inaccurately described the official who had authorized the applications and that neither the initial application for the October 16 order nor the application for the



November 6 extension order had been approved and authorized by Assistant Attorney General Will Wilson, as the applications had indicated. An affidavit of the Executive Assistant to the Attorney General divulged that he, the Executive Assistant, had reviewed the request for authorization to apply for the initial order, had concluded, from his "knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him," and, because the Attorney General was then on a trip away from Washington, D. C., and pursuant to authorization by the Attorney General for him to do so in such circumstances, had approved the request and caused the Attorney General's initials to be placed on a memorandum to Wilson instructing him to authorize Brocato to proceed. The affidavit also stated that the Attorney General himself had approved the November 6 request for extension and had initialed the memorandum to Wilson designating him to authorize Brocato to make application for an extension order. It was also revealed that although the applications recited that they had been authorized by Will Wilson, he had not himself reviewed Brocato's applications, and that his action was at best only formal authorization to Brocato. Furthermore, it became apparent that Wilson did not himself sign either of the letters bearing his name and accompanying the applications to the District Court. Instead, it appeared that someone in Wilson's office had affixed his signature after the signing of the letters had been authorized by a Deputy Assistant Attorney General in the Criminal Division who had, in turn, acted after the approval of the request for authorization had occurred in and had been received from the Office of the Attorney General.

The District Court sustained the motions to suppress on the ground that the officer in the Justice Department

approving each application had been misidentified in the applications and intercept orders, in violation of 18 U. S. C. §§ 2518 (1)(a) and (4)(d), *United States v. Focarile*, 340 F. Supp. 1033, 1060 (Md. 1972). On the Government's pretrial appeal under 18 U. S. C. § 3731, the Court of Appeals affirmed on the different ground that the authorization of the October 16 wiretap application by the Attorney General's Executive Assistant violated § 2516 (1) of the statute and struck at "the very heart" of Title III, thereby requiring suppression of the wiretap and derivative evidence under §§ 2515 and 2518 (10)(a)(i) and (ii).<sup>2</sup> 469 F. 2d 522, 531. We granted certiorari to resolve the conflict with decisions of the Court of Appeals for the Second Circuit<sup>3</sup> with respect to

<sup>2</sup> Evidence derived from the unlawful interceptions conducted pursuant to the October 16 wiretap order was held to include the evidence obtained under the November 6 wiretap extension order and also the evidence secured under court orders of October 22 and November 6 extending investigative authority to use a "pen register," i. e., a device that records telephone numbers dialed from a particular phone, which had previously been used to monitor the numbers dialed from Giordano's phone pursuant to a court order of October 8. The applications presented to the District Court to extend wiretap and pen register authority each detailed at considerable length the contents of conversations intercepted pursuant to the October 16 order in support of the requests. We therefore agree with the Court of Appeals, for the reasons discussed in Part IV, *infra*, that evidence gathered under the wiretap and pen register extension orders is tainted by the use of unlawfully intercepted communications under the October 16 order to secure judicial approval for the extensions, and must be suppressed.

<sup>3</sup> The Second Circuit has held that approval of wiretap applications by the Attorney General's Executive Assistant complies with the dictates of § 2516 (1). In *United States v. Pisacano*, 459 F. 2d 259 (1972), the court refused to permit withdrawal of guilty pleas on the basis of subsequent discovery that the Executive Assistant had authorized the first of three wiretap applications, declaring that it was "not at all convinced that if this case had gone

the administration of the circumscribed authority Congress has granted in Title III for the use of wiretapping and wiretap evidence by law enforcement officers. 411 U.S. 905.

## II

The United States contends that the authorization of intercept applications by the Attorney General's Executive Assistant was not inconsistent with the statute and that even if it were, there being no constitutional violation, the wiretap and derivative evidence should not have been ordered suppressed. We disagree with both contentions.<sup>4</sup>

Turning first to whether the statute permits the authorization of wiretap applications by the Attorney General's Executive Assistant, we begin with the lan-

to trial and the court had refused to suppress evidence obtained by the wiretaps, we would have reversed," and that "the Justice Department's procedures were very likely consistent with the mandate of § 2516 (1)." *Id.*, at 264 and n. 5. Shortly thereafter a different panel of that Circuit affirmed judgments of convictions in a case raising the same issue, out of "adherence to the law of the circuit" so recently decided and with the admonition that its decision should "not . . . be construed as an approval of the procedure followed by the Attorney General and his staff." *United States v. Becker*, 461 F. 2d 230, 236 (1972). In every other circuit which has considered the issue, suppression of evidence derived from court-approved wire interceptions based on an application authorized by the Attorney General's Executive Assistant has been held to be required by Title III. *United States v. Mantello*, 156 U. S. App. D. C. 2, 478 F. 2d 671 (1973); *United States v. Roberts*, 477 F. 2d 57 (CA7 1973); *United States v. King*, 478 F. 2d 494 (CA9 1973). See also *United States v. Robinson*, 468 F. 2d 189 (CA5 1972), remanded for an evidentiary hearing to determine whether the applications were properly authorized under § 2516 (1), 472 F. 2d 973 (en banc 1973).

<sup>4</sup> Because of our disposition of this case, we do not reach the grounds relied upon by the District Court. The issue resolved in the District Court, however, is the subject of the companion case, *United States v. Chavez*, *post*, p. 562.

guage of § 2516 (1), which provides that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize" an application for intercept authority. Plainly enough, the Executive Assistant is neither the Attorney General nor a specially designated Assistant Attorney General; but the United States argues that 28 U. S. C. § 509,<sup>5</sup> deriving from the Reorganization Acts of 1949 and 1950, vests all functions of the Department of Justice, with some exceptions, in the Attorney General, and that Congress characteristically assigns newly created duties to the Attorney General rather than to the Department of Justice, thus making essential the provision for delegation appearing in 28 U. S. C. § 510:

"The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

It is therefore argued that merely vesting a duty in the Attorney General, as it is said Congress did in § 2516 (1), evinces no intention whatsoever to preclude delegation to other officers in the Department of Justice, including those on the Attorney General's own staff.

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<sup>5</sup> In full, 28 U. S. C. § 509 provides:

"§ 509. Functions of the Attorney General.

"All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

"(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

"(2) of the Federal Prison Industries, Inc.;

"(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

"(4) of the Board of Parole."

As a general proposition, the argument is unexceptionable. But here the matter of delegation is expressly addressed by § 2516 and the power of the Attorney General in this respect is specifically limited to delegating his authority to "any Assistant Attorney General specially designated by the Attorney General." Despite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated. Under the Civil Rights Act of 1968, for instance, certain prosecutions are authorized only on the certification of the Attorney General or the Deputy Attorney General, "which function of certification may not be delegated." 18 U. S. C. § 245 (a)(1). Equally precise language forbidding delegation was not employed in the legislation before us; but we think § 2516 (1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate. This interpretation of the statute is also strongly supported by its purpose and legislative history.

The purpose of the legislation, which was passed in 1968, was effectively to prohibit, on the pain of criminal and civil penalties,<sup>6</sup> all interceptions of oral and wire communications, except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with the investigation of the serious crimes listed in § 2516. Judicial wiretap orders must be preceded by applications containing prescribed information, § 2518 (1). The judge must make certain findings before authorizing interceptions, including the existence of probable cause, § 2518 (3). The orders themselves

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<sup>6</sup> Criminal sanctions were provided in 18 U. S. C. § 2511, and a civil damage remedy was created by § 2520. See Appendix to this opinion, *post*, p. 534.

must particularize the extent and nature of the interceptions that they authorize, § 2518 (4), and they expire within a specified time unless expressly extended by a judge based on further application by enforcement officials, § 2518 (5). Judicial supervision of the progress of the interception is provided for, § 2518 (6), as is official control of the custody of any recordings or tapes produced by the interceptions carried out pursuant to the order, § 2518 (8). The Act also contains provisions specifying the circumstances and procedures under and by which aggrieved persons may seek and obtain orders for the suppression of intercepted wire or oral communications sought to be used in evidence by the Government. § 2518 (10)(a).

The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. §§ 2518 (1)(c) and (3)(c). The Act plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgment of a particular,

responsible Department of Justice official is interposed as a critical precondition to any judicial order.

The legislative history of the Act supports this view. As we have indicated, the Act was passed in 1968, but the provision of § 2516 requiring approval of applications by the Attorney General or a designated Assistant Attorney General dates from 1961, when a predecessor bill was being considered in the 87th Congress. Section 4 (b) of that bill, S. 1495, which was also aimed at prohibiting all but designated official interception, initially provided that the "Attorney General, or any officer of the Department of Justice or any United States Attorney specially designated by the Attorney General, may authorize any investigative or law enforcement officer of the United States or any Federal agency to apply to a judge" for a wire interception order. Hearings on Wiretapping and Eavesdropping Legislation before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 5 (1961). Under that phraseology, the authority was centered in the Attorney General, but he could empower any officer of the Department of Justice, including United States Attorneys and the Executive Assistant, to authorize applications for intercept orders. At hearings on the bill, the Assistant Attorney General in charge of the Criminal Division stated the views of the Department of Justice, and the Department later officially proposed, that the authority to approve applications be substantially narrowed so that the Attorney General could delegate his authority only to an Assistant Attorney General. The testimony was:

"This is the approach of S. 1495, with which the Department of Justice is in general agreement. The bill makes wiretapping a crime unless specifically authorized by a Federal judge in situations involving

specified crimes. As I understand the bill, the application for a court order could be made only by the authority of the Attorney General or an officer of the Department of Justice or U. S. Attorney authorized by him. I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any assistant Attorney General whom he may designate. This would give greater assurance of a responsible executive determination of the need and justifiability of each interception." *Id.*, at 356.

The official proposal was that § 4 (b) be changed to provide that the "Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, may authorize" a wiretap application. *Id.*, at 372.

S. 1495 was not enacted, but its provision limiting those who could approve applications for court orders survived and was included in almost identical form in later legislative proposals, including the bill that became Title III of the Act now before us.<sup>7</sup> In the course of

<sup>7</sup> In 1967, a draft statute prepared by Professor G. Robert Blakey of the University of Notre Dame Law School to regulate the interception of wire and oral communications was published in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, Appendix C, at 106-113. In part, it would have added a provision to Title 18, United States Code, which empowered the "Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General" to authorize an application to a federal judge for an order to intercept wire or oral communications. *Id.*, at 108. Senator McClellan introduced a proposed "Federal Wire Interception Act," S. 675, on January 25, 1967, 113 Cong. Rec. 1491, containing, in § 5 (a), the same designations of which federal prosecuting officials could authorize a wiretap application. Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Com-



testimony before a House Committee in 1967, the draftsman of the bill containing the basic outline of Title III engaged in the following colloquy:

"The CHAIRMAN. . . . About the origin of the application, as I understand it, your bill provides it must be originated by the Attorney General or an Assistant Attorney General. Am I correct in that regard?

"Professor BLAKEY. Yes, you are, Mr. Chairman.

"The CHAIRMAN. The application must be made by the Attorney General or an Assistant Attorney General.

"Professor BLAKEY. If I am not mistaken, the present procedure is before any wiretapping or electronic equipment is used now it is generally approved at that level anyway, Mr. Chairman, and I would not want this equipment used without high level responsible officials passing on it. It may very well be that in some number of cases there will not be time to get the Attorney General to approve it. I think we are going to have just [*sic*] to let those cases go, and that if this equipment is to be used it ought to be approved by the highest level in the

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mittee on the Judiciary, 90th Cong., 1st Sess., 76 (1967). Senator Hruska later introduced S. 2050 on June 29, 1967, 113 Cong. Rec. 18007, which would have provided for regulated use of electronic surveillance, as well as wiretapping, and which again made provision, in a new § 2516 to be added to Title 18, United States Code, for the same system of approval of applications for the interception of wire or oral communications as was present in the Blakey bill. Hearings, *supra*, at 1005. In the House of Representatives, the Blakey bill was introduced on October 3, 1967, in the form of H. R. 13275, 113 Cong. Rec. 27718. Ultimately, the same operative language was enacted in Title III.

Department of Justice. If we cannot make certain cases, that is going to have to be the price we will have to pay." Hearings on Anti-Crime Program before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 1379 (1967).<sup>a</sup>

<sup>a</sup> In the hearings on the McClellan bill, S. 675, see n. 7, *supra*, the limitation on the application authorization power was frequently brought to the fore. Thus, Chief Judge Lumbard of the United States Court of Appeals for the Second Circuit, who had earlier been United States Attorney for the Southern District of New York, noted in testimony on March 8, 1967, that the "application would require approval of the Attorney General or a designated assistant . . .," and he urged, in support of his recommendation that it was unnecessary to limit the use of wiretapping to the investigation of a narrow group of serious crimes, the fact that there were other factors which would greatly limit the use of wiretapping, beginning with the observation that "the proposed statute, section 5a, provides that only the Attorney General, or any Assistant Attorney General specifically designated by him, may authorize the necessary application to a Federal judge for approval to wiretap. Thus the application will be carefully screened." Hearings on Controlling Crime Through More Effective Law Enforcement, *supra*, n. 7, at 171-172. A letter urging adoption of legislation to govern the area of wiretapping and electronic eavesdropping was sent to the subcommittee on March 7 by all living former United States Attorneys of the Southern District of New York, who recommended that interception be prohibited "unless authorized by a Federal judge on application of the Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, when such authorized interception or recording may provide evidence of an offense against the laws of the United States." *Id.*, at 511-512. And Senator McClellan himself commented to a judge testifying before the subcommittee:

"This legislation, as you know, requires rather thorough court supervision through the application for a court order made by the Attorney General or officials designated in the bill. A court, of course, would have to weigh the probable cause or the reasonable cause in support of such an application. I do not know how to tighten it up any more than we have in the bill. . . . Can you tell us how to tighten it up any more?" *Id.*, at 894-895.

As it turned out, the House Judiciary Committee did not report out a wiretap bill, but the House did pass H. R. 5037, entitled the "Law Enforcement and Criminal Justice Assistance Act of 1967," 113 Cong. Rec. 21861 (Aug. 8, 1967). The Senate amended that bill by adding to it Title III, which in turn essentially reflected the provisions of S. 917, which had been favorably reported by the Senate Judiciary Committee and which contained the Committee's own proposals with respect to the interception of oral and wire communications. The report on the bill stated:

"Section 2516 of the new chapter authorizes the interception of particular wire or oral communication under court order pursuant to the authorization of the appropriate Federal, State, or local prosecuting officer.

"Paragraph (1) . . . centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." S. Rep. No. 1097, 90th Cong., 2d Sess., 96-97 (1968).

This report is particularly significant in that it not only recognizes that the authority to apply for court orders is to be narrowly confined but also declares that it is to be limited to those responsive to the political process, a category to which the Executive Assistant to the Attorney General obviously does not belong.\*

\*The Attorney General is appointed by the President, by and with the advice and consent of the Senate, 28 U. S. C. § 503, as

The Senate passed H. R. 5037, with the amendments tracking the provisions of S. 917, on May 23, 1968, as the Omnibus Crime Control and Safe Streets Act of 1968, 114 Cong. Rec. 14798 and 14889. During the proceedings leading to the passage of the bill, emphasis was again placed on § 2516. That the Attorney General had the exclusive authority to approve or provide for the approval of wiretap applications was reiterated, and it was made clear that as the bill was drafted no United States Attorney would have or could be given the authority to apply for an intercept order without the advance approval of a senior officer in the Department.<sup>10</sup>

are the nine Assistant Attorneys General provided for in 28 U. S. C. § 506. The position of Executive Assistant, on the other hand, is established by regulation, to assist the Attorney General, *inter alia*, in the review of "matters submitted for the Attorney General's action" and to "[p]erform such other duties and functions as may be specially assigned from time to time by the Attorney General." 28 CFR § 0.6. It would appear from the Government's brief that the Executive Assistant involved in this case served as Executive Assistant to at least four Attorneys General.

<sup>10</sup> In debate on the Senate floor the day before Title III was adopted, Senator McClellan responded to an inquiry of Senator Lausche in the following matter:

"Mr. LAUSCHE. Does the bill as now written give absolute, unconditional power to stop searches or tapping, or to authorize tapping?

"Mr. McCLELLAN. No. We have to go first to the Attorney General in the case of the Federal Government, and to the chief law enforcement officers of a State . . . .

"Mr. LAUSCHE. There is, then, a prohibition against tapping unless the application is filed with the chief law enforcement official. He approves it and then the application is filed with the court, is that not correct?

"Mr. McCLELLAN. The chief law enforcement officer, like the Attorney General of the United States, must authorize the application . . . . A prosecuting attorney or a U. S. district attorney cannot, on his own motion, do it. He has to get the authority from the

There was no congressional attempt, however, to extend that authority beyond the Attorney General or his Assistant Attorney General designate.

The Government insists that because § 2516 (2) provides for a wider dispersal of authority among state officers to approve wiretap applications and leaves the matter of delegation up to state law,<sup>11</sup> it is inappropriate

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Attorney General of the United States first to submit the application to the court." 114 Cong. Rec. 14469.

During the same debate, Senator Long read from a report of the Association of the Bar of the City of New York, Committee on Federal Legislation, Committee on Civil Rights, "Proposed Legislation on Wiretapping and Eavesdropping after *Berger v. New York* and *Katz v. United States*," which commented on the application provisions of Title III in the following manner:

"Who May Apply

"The Blakey Bill provides that applications for wiretapping or eavesdropping orders may be made by only a limited number of persons. At the Federal level these are the Attorney General of the United States or an Assistant Attorney General and at the State level they are the State Attorney General or the principal prosecuting attorney of a political subdivision (such as a county or city District Attorney).

"We agree that responsibility should be focused on those public officials who will be principally accountable to the courts and the public for their actions. Police and investigative agencies should not have the power to make such applications on their own. On the other hand, it seems anomalous to permit only very high Federal officials to apply, excluding such officials as United States Attorneys for entire States or Districts like the Southern District of New York, while permitting county district attorneys with substantially less responsibility to make applications. . . .

"We also would seek to reduce the anomaly referred to above by providing that the Attorney General may delegate to United States Attorneys the power to initiate applications." 114 Cong. Rec. 14473-14474.

<sup>11</sup> The following comments concerning § 2516 (2) are found in S. Rep. No. 1097, 90th Cong., 2d Sess., 98 (1968):

"Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political

to confine the authority so narrowly on the federal level. But it is apparent that Congress desired to centralize and limit this authority where it was feasible to do so, a desire easily implemented in the federal establishment by confining the authority to approve wiretap applications to the Attorney General or a designated Assistant Attorney General. To us, it appears wholly at odds with the scheme and history of the Act to construe § 2516 (1) to permit the Attorney General to delegate his authority at will, whether it be to his Executive Assistant or to any officer in the Department other than an Assistant Attorney General.<sup>12</sup>

subdivision of a State may authorize an application to a State judge of competent jurisdiction . . . for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most States, the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State. . . . Where no such office exists, policymaking would not be possible on a statewide basis; it would have to move down to the next level of government. In most States, the principal prosecuting attorney at the next political level of a State, usually the county, would be the district attorney, State's attorney, or county solicitor. The intent . . . is to centralize areawide law enforcement policy in him. . . . Where there are both an attorney general and a district attorney, either could authorize applications, the attorney general anywhere in the State and the district attorney anywhere in his county. The proposed provision does not envision a further breakdown. Although city attorneys may have in some places limited criminal prosecuting jurisdiction, the proposed provision is not intended to include them."

<sup>12</sup> We also deem it clear that the authority must be exercised *before* the application is presented to a federal judge. The suggestion that it is acceptable practice under § 2516 (1) for the Attorney General's Executive Assistant to approve wiretap applications in the Attorney General's absence if the Attorney General

## III

We also reject the Government's contention that even if the approval by the Attorney General's Executive Assistant of the October 16 application did not comply with the statutory requirements, the evidence obtained from the interceptions should not have been suppressed. The issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III; and, in our view, the Court of Appeals correctly suppressed the challenged wiretap evidence.

Section 2515 provides that no part of the contents of any wire or oral communication, and no evidence derived therefrom, may be received at certain proceedings, including trials, "if the disclosure of that information would be in violation of this chapter." What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by § 2518 (10)(a), which provides for suppression of evidence on the following grounds:

"(i) the communication was unlawfully intercepted;

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subsequently, after a court order has issued, ratifies the giving of approval in the particular instance, either directly or by personally approving the submission of a further application for an extension order, as in this case, is wide of the mark. As the Court of Appeals for the Fifth Circuit noted in the panel decision in *United States v. Robinson*, 468 F. 2d, at 193, the Attorney General's "authority from Congress was to initiate wiretap applications, not to seek to have those terminated he found should never have been requested in the first place." It would ill serve the congressional policy of having the Attorney General or one of his Assistants screen the applications prior to their submission to court to have the screening process occur after the application is made and after investigative officials have already begun to intercept wire or oral communications under a court order predicated on the assumption that proper authorization to apply for intercept authority had been given.

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."<sup>13</sup>

The Court of Appeals held that the communications the Government desired to offer in evidence had been "unlawfully intercepted" within the meaning of paragraph (i), because the October application had been approved by the Executive Assistant to the Attorney General rather than by the Attorney General himself or a designated Assistant Attorney General.<sup>14</sup> We have already determined that delegation to the Executive Assistant was indeed contrary to the statute; but the Government contends that approval by the wrong official is a statutory violation only and that paragraph (i) must be construed to reach constitutional, but not statutory, violations.<sup>15</sup> The argument is a straightforward one based on the structure of § 2518 (10)(a). On the one hand, the unlawful interceptions referred to in para-

<sup>13</sup> No question is raised in this case concerning the manner of conducting the court-approved interceptions of Giordano's telephone and thus § 2518 (10)(a)(iii) is inapplicable to the present situation.

<sup>14</sup> The Court of Appeals also held that suppression was required under subdivision (ii) on the theory that the absence of any valid authorization of the wiretap application was the equivalent of failing to identify at all in the interception order the person who authorized the application, rendering the order "insufficient on its face." Manifestly, however, the order, on its face, clearly, though erroneously, identified Assistant Attorney General Wilson as the Justice Department officer authorizing the application, pursuant to special designation by the Attorney General. As it stood, the intercept order was facially sufficient under § 2516 (1), and despite what was subsequently discovered, the Court of Appeals was in error in justifying suppression under § 2518 (10)(a)(ii).

<sup>15</sup> The Government suggested at oral argument that, in addition to constitutional violations, willful statutory violations might also fit within the terms of § 2518 (10)(a)(i). Tr. of Oral Arg. 33.



graph (i) must include some constitutional violations. Suppression for lack of probable cause, for example, is not provided for in so many words and must fall within paragraph (i) unless, as is most unlikely, the statutory suppression procedures were not intended to reach constitutional violations at all. On the other hand paragraphs (ii) and (iii) plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under paragraph (i), else there would have been no necessity for paragraphs (ii) and (iii)—or to put the matter another way, if unlawful interceptions under paragraph (i) include purely statutory issues, paragraphs (ii) and (iii) are drained of all meaning and are surplusage. The conclusion of the argument is that if nonconstitutional omissions reached by paragraphs (ii) and (iii) are not unlawful interceptions under paragraph (i), then there is no basis for holding that “unlawful interceptions” include *any* such statutory matters; the *only* purely statutory transgressions warranting suppression are those falling within paragraphs (ii) and (iii).

The position gains some support from the fact that predecessor bills specified a fourth ground for suppression—the lack of probable cause—which was omitted in subsequent bills, apparently on the ground that it was not needed because official interceptions without probable cause would be unlawful within the meaning of paragraph (i).<sup>16</sup> Arguably, the inference is that since

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<sup>16</sup> The draft statute prepared by Professor Blakey provided this fourth ground warranting suppression in cases where there was no probable cause for believing the existence of the grounds on which the interception order was issued. Task Force Report: Organized Crime, *supra*, n. 7, at 111, § 3803 (k)(1)(C). So did the McClellan bill, S. 675, which was introduced prior to *Berger v. New York*, 388 U. S. 41 (1967). Hearings on Controlling Crime Through More Effective Law Enforcement, *supra*, n. 7, at 78, § 8 (g)(3). But the

paragraphs (ii) and (iii) were retained, they must have been considered "necessary," that is, not covered by paragraph (i).

The argument of the United States has substance, and it does appear that paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i). But it does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i). The words "unlawfully intercepted" are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. We have already determined that Congress intended not only to limit resort to wiretapping to certain crimes and situations where probable cause is present but also to condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice that the situation is one of those warranting their use. It is

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bill proposed by Senator Hruska after *Berger* (S. 2050) omitted this ground in a provision the language of which is substantially identical to § 2518 (10) (a) as finally enacted. *Id.*, at 1008, § 2518 (k) (1). An explanation for the omission is provided in an appendix comparing S. 675 with S. 2050, which was published by Senator Scott, a cosponsor of the latter bill, in an article in the *Howard Law Journal*, *Wiretapping and Organized Crime*, 14 *How. L. J.* 1 (1968), and which was reprinted in Senator Scott's remarks on the Senate floor concerning the Omnibus Crime Control and Safe Streets Act of 1968. 114 *Cong. Rec.* 13205-13211. It is there simply stated that "Senator Hruska's man says that the probable cause test is implied in (1)." *Id.*, at 13211.

reasonable to believe that such a precondition would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use. We are confident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored.

The principal piece of legislative history relative to this question is S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). The Government emphasizes that the report expressly states that § 2518 (10)(a) "largely reflects existing law" and that there was no intention to "press the scope of the suppression role beyond present search and seizure law." *Id.*, at 96. But the report also states that the section provides for suppression of evidence directly or indirectly obtained "in violation of the chapter" and that the provision "should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications."<sup>17</sup> Moreover, it would not extend existing search-

<sup>17</sup> In relevant part S. Rep. No. 1097, *supra*, n. 11, at 96, 106, provides:

"Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. . . . The provision must, of course, be read in light of section 2518 (10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United States*, 302 U. S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States*, 308 U. S. 338 (1939).) There is, however, no intention to change the attenuation rule. . . . Nor generally to press the scope of the suppression role beyond present search and seizure law. . . . But it does apply across the board in both Federal and State proceeding[s]. . . . And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. . . . The provision thus forms an integral part of the system of limita-

and-seizure law for Congress to provide for the suppression of evidence obtained in violation of explicit statutory prohibitions. *Nardone v. United States*, 302 U. S. 379 (1937); *Nardone v. United States*, 308 U. S. 338 (1939).<sup>18</sup>

#### IV

Even though suppression of the wire communications intercepted under the October 16, 1970, order is required, the Government nevertheless contends that com-

tions designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.

"[Section 2518 (10)(a)] must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. [Except for its inapplicability to grand jury proceedings and an absence of intent to grant jurisdiction to federal courts over Congress,] [o]therwise, the scope of the provision is intended to be comprehensive."

<sup>18</sup> We find without substance the Government's suggestion that since 18 U. S. C. § 2511 (1)(c) makes criminal the "willful" disclosure of the contents of an intercepted communication, "knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection," and § 2515 ties the propriety of suppression of evidence to the impropriety of its "disclosure," to hold that statutory violations committed in the Justice Department's internal approval and submission procedures with respect to wiretap applications preclude disclosure in court would be to attribute to Congress an intent to impose substantial criminal penalties for "every defect in processing applications." Brief for United States 38. Apart from the fact that a majority of the Court in *United States v. Chavez*, *post*, p. 562, has concluded that not every defect will warrant suppression, it is evident that § 2511 does not impose criminal liability unless disclosure is "willful" and unless the information was known to have been obtained in violation of § 2511 (1). Clearly, the circumstances under which suppression of evidence would be required are not necessarily the same as those under which a criminal violation of Title III would be found.

munications intercepted under the November 6 extension order are admissible because they are not "evidence derived" from the contents of communications intercepted under the October 16 order within the meaning of §§ 2515 and 2518 (10)(a). This position is untenable.

Under § 2518, extension orders do not stand on the same footing as original authorizations but are provided for separately. "Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section." § 2518 (5). Under subsection (1)(e), applications for extensions must reveal previous applications and orders, and under (1)(f) must contain "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." Based on the application, the court is required to make the same findings that are required in connection with the original order; that is, it must be found not only that there is probable cause in the traditional sense and that normal investigative procedures are unlikely to succeed but also that there is probable cause for believing that particular communications concerning the offense will be obtained through the interception and for believing that the facilities or place from which the wire or oral communications are to be intercepted are used or will be used in connection with the commission of such offense or are under lease to the suspect or commonly used by him. § 2518 (3).

In its November 6 application, the Government sought authority to intercept the conversations of not only Giordano, who alone was expressly named in the initial application and order, but of nine other named persons who were alleged to be involved with Giordano in narcotics violations. Based on the attached affidavit, it was alleged that there was probable cause to believe that

communications concerning the offense involved would be intercepted, particularly those between Giordano and the other named individuals, as well as those with others as yet unnamed, and that the telephone listed in the name of Giordano and whose monitoring was sought to be continued "has been used, and is being used and will be used, in connection with the commission of the offenses described." App. 62.

In the affidavit supporting the application, the United States set out the previous applications and orders, incorporated by reference and reasserted the "facts, details and conclusions contained in [the] affidavits" supporting the prior wiretap application, and set down in detail the relevant communications overheard under the existing order, as well as the physical movements of Giordano observed as the result of an around-the-clock surveillance that had been conducted by the authorities. App. 65-81. The Government concluded "[a]fter analyzing the intercepted conversations to and from [Giordano's telephone] and the results of BNDD surveillance" that nine listed individuals, some identified only by aliases, were associated with Giordano as suppliers or buyers in illegal narcotics trafficking and that certain other persons were perhaps connected with the operation in an as yet undisclosed fashion. *Id.*, at 79-80. It was also said that the full scope of Giordano's organization was not yet known. *Id.*, at 80. Assertedly, Giordano was extremely guarded in his telephone conversations, "any specific narcotics conversations he makes are from pay phones" and "[c]onventional surveillance would be completely ineffective except as an adjunct to electronic interception." *Id.*, at 81. The United States accordingly requested an extension of the interception order for no longer than a 15-day period.

It is apparent from the foregoing that the communications intercepted pursuant to the extension order were

evidence derived from the communications invalidly intercepted pursuant to the initial order. In the first place, the application sought and the order granted authority to intercept the communications of various named individuals not mentioned in the initial order. It is plain from the affidavit submitted that information about most of these persons was obtained through the initial illegal interceptions. It is equally plain that the telephone monitoring and accompanying surveillance were coordinated operations, necessarily intertwined. As the Government asserted, the surveillance and conventional investigative techniques "would be completely ineffective except as an adjunct to electronic interception." That the extension order and the interceptions under it were not in fact the product of the earlier electronic surveillance is incredible.

Second, an extension order could validly be granted *only* upon an application complying with subsection (1) of § 2518. Subsection (1)(e) requires that the fact of prior applications and orders be revealed, and (1)(f) directs that the application set out either the results obtained under the prior order or an explanation for the absence of such results. Plainly the function of § 2518 (1)(f) is to permit the court realistically to appraise the probability that relevant conversations will be overheard in the future. If during the initial period, no communications of the kind that had been anticipated had been overheard, the Act requires an adequate explanation for the failure before the necessary findings can be made as a predicate to an extension order. But here there were results, and they were set out in great detail. Had they been omitted no extension order at all could have been granted; but with them, there were sufficient facts to warrant the trial court's finding, in accordance with § 2518 (3)(b), of probable cause to believe that wire communications concerning the offenses involved "will

be obtained through the interception," App. 83, as well as the finding complying with § 2518 (3)(d) that there was probable cause to believe that Giordano's telephone "has been used, is being used, and will be used, in connection with the commission of the offenses described above and is commonly used by Nicholas Giordano . . ." and nine other named persons. *Ibid.*

It is urged in dissent that the information obtained from the illegal October 16 interception order may be ignored and that the remaining evidence submitted in the extension application was sufficient to support the extension order. But whether or not the application, without the facts obtained from monitoring Giordano's telephone, would independently support original wiretap authority, the Act itself forbids extensions of prior authorizations without consideration of the results meanwhile obtained. Obviously, those results were presented, considered, and relied on in this case. Moreover, as previously noted, the Government itself had stated that the wire interception was an indispensable factor in its investigation and that ordinary surveillance alone would have been insufficient. In our view, the results of the conversations overheard under the initial order were essential, both in fact and in law, to any extension of the intercept authority. Accordingly, communications intercepted under the extension order are derivative evidence and must be suppressed.<sup>19</sup> The judgment of the Court of Appeals is

*Affirmed.*

[For concurring opinion of MR. JUSTICE DOUGLAS, see *post*, p. 580.]

<sup>19</sup> We are also of the view that the evidence obtained from the extended authorizations of October 22 and November 6 for the installation and use of the pen register device on Giordano's



## APPENDIX TO OPINION OF THE COURT

RELEVANT PROVISIONS OF TITLE III, OMNIBUS CRIME  
CONTROL AND SAFE STREETS ACT OF 1968, 18  
U. S. C. §§ 2510-2520

§ 2511. Interception and disclosure of wire or oral communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; or

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know,

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telephone was inadmissible because derived from the invalid wire interception that began on October 16. See n. 2, *supra*. The application for the October 22 extension attached the logs of telephone conversations monitored under the October 16 order and asserted that these logs revealed the "continued use of the telephone . . . for conversations regarding illegal trafficking in narcotics." App. 55. In these circumstances, it appears to us that the illegally monitored conversations should be considered a critical element in extending the pen register authority. We have been furnished with nothing to indicate that the pen register extension of November 6 should be accorded any different treatment.

that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) (a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition

of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

**§ 2516. Authorization for interception of wire or oral communications.**

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501 (c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of

State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chap-

ter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications

sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications



within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether

or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained

in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with

the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

- (i) the communication was unlawfully intercepted;
  - (ii) the order of authorization or approval under which it was intercepted is insufficient on its face;
- or

- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal

is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2520. Recovery of civil damages authorized.

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I agree with the majority that the authorization by the Executive Assistant to the Attorney General of the application for the October 16 interception order contravened 18 U. S. C. § 2516 (1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order. I therefore join Parts I, II, and III of the opinion of the Court. For the reasons stated below, however, I dissent from the Court's conclusion, stated in Part IV of its opinion, that evidence

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obtained under the two "pen register"<sup>1</sup> extension orders and under the November 6 extension of the interception order must also be suppressed.

These are the pertinent facts. On October 8, 1970, the Chief Judge of the United States District Court for the District of Maryland authorized the use of a pen register device to monitor and record for a 14-day period all numbers dialed from a telephone listed to respondent Giordano. There is no dispute that the pen register order was based on probable cause and was therefore lawful under the Fourth Amendment. On October 16, 1970, the District Court issued an order authorizing the interception of wire communications to and from Giordano's telephone for a period not to exceed 21 days. There is likewise no dispute that the wiretap order was based on probable cause. The defect in the application for this order was not the strength of the Government's showing on the merits of its request but the authorization of the application by the Executive Assistant to the Attorney General rather than by one of the officials specifically designated in 18 U. S. C. § 2516 (1). As a result of this procedural irregularity both the contents of communications intercepted under the October 16 wiretap order and any "evidence derived therefrom" must be suppressed. 18 U. S. C. §§ 2515 and 2518 (10)(a).

The authorization for use of the pen register device was extended by orders dated October 22 and Novem-

<sup>1</sup> A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court. 340 F. Supp. 1033, 1038-1041 (Md. 1972).



ber 6, 1970. On the latter date the District Court also extended the intercept authority for a maximum additional period of 15 days. All three extension orders were based in part, *but only in part*, on evidence obtained under the invalid wiretap order of October 16. The wiretap extension order, unlike the original intercept order, was not marred by the defect of improper authorization.

The Government contends that, putting aside all evidence derived from the invalid original wiretap order, the independent and untainted evidence submitted to the District Court constituted probable cause for issuance of both pen register extension orders and the wiretap extension order, and in the latter case also satisfied the additional requirements imposed by 18 U. S. C. § 2518 (3).<sup>2</sup> Preoccupied with the larger issues in the case, the District Court summarily dismissed this contention insofar as it related to the pen register extension orders:

"The subsequent extension orders are not supported by sufficient showings of probable cause,

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<sup>2</sup> Under 18 U. S. C. § 2518 (3), the court is required to make the following determinations:

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

however, for the reason that information was used to obtain those extension orders from a Title III wiretap which, for reasons appearing later in this opinion, was defective. The 'fruit of the poisonous tree' doctrine requires the suppression of all pen register information obtained under the subsequent orders. *Nardone v. United States*, 308 U. S. 338 . . . (1939); 18 U. S. C. § 2518 (10)(a)." 340 F. Supp. 1033, 1041 (Md. 1972).

The Court of Appeals did not mention the point. 469 F. 2d 522 (CA4 1972).

With respect to the wiretap extension, neither the District Court nor the Court of Appeals addressed the Government's contention that communications intercepted under the extension were not derivatively tainted by the improper authorization defect in the original wiretap order, and neither court made any finding on this contention. The District Court simply found the wiretap extension order invalid on a different ground applicable both to the extension and to the original order. Specifically, the court concluded that the original wiretap order was unlawful because the application for it misidentified the approving officer and therefore failed to comply strictly with the provisions of 18 U. S. C. §§ 2518 (1)(a) and (4)(d). The misidentification problem occurred in the application for the original wiretap order *and* in the application for the wiretap extension. The District Court held the extension order invalid on that basis alone and ordered the evidence pursuant thereto suppressed for that reason.<sup>3</sup> The Court of

<sup>3</sup> Immediately after stating its conclusion that the misidentification problem required suppression, the District Court made its sole reference to the November 6 extension order:

"The application and order relating to the extension of the wire-

Appeals affirmed on a different ground entirely. It held the original order invalid because the application for it had been approved by the Executive Assistant to the Attorney General rather than by one of the officials designated in 18 U. S. C. § 2516 (1). The defect of improper authorization, unlike the misidentification problem, arose *only* in connection with the original wiretap order. Perhaps through simple oversight, the Court of Appeals failed to consider the fate of the evidence obtained under the extension. Thus neither of the lower courts ruled on the derivative evidence question.

Today we affirm the suppression of evidence obtained under the original wiretap order for the same reason adopted by the Court of Appeals—the defect of improper authorization. As noted above, this defect did not occur in the application for the wiretap extension order. Today we also hold that misidentification of the approving authority does not render inadmissible evidence obtained pursuant to a resulting interception order. *United States v. Chavez*, *post*, p. 562. This decision removes the sole basis advanced by the District Court for suppressing the telephone conversations intercepted under the wiretap extension order and requires us to consider whether that evidence should be suppressed by reason of the improper authorization of the application for the original order. In doing so it is important to note that we are the first court to consider this aspect of the case.

The majority holds that the invalidity of the original wiretap order requires suppression of all evidence

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tap are defective for the same reasons as the original application and order.” 340 F. Supp., at 1060.

Plainly, this reference to the “same reasons” concerns the failure to comply literally with §§ 2518 (1)(a) and (4)(d) identification requirements and has nothing to do with any derivative-evidence rule.

obtained under the three extension orders. In my view the application to this case of well-established principles, principles developed by the courts to effectuate constitutional guarantees and adopted by Congress to effectuate the statutory guarantees of Title III, demonstrates that the majority's conclusion is error. As will appear, the same analysis governs all three extension orders, but it may clarify my position to deal with the two pen register extension orders in Part I, below, and to reserve discussion of the November 6 extension of the wiretap for Part II.

## I

The installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III. This was the conclusion of the District Court in the instant case and of the courts in *United States v. King*, 335 F. Supp. 523, 548-549 (SD Cal. 1971), and in *United States v. Vega*, 52 F. R. D. 503, 507 (EDNY 1971). This conclusion rests on the fact that the device does not hear sound and therefore does not accomplish any "interception" of wire communications as that term is defined by 18 U. S. C. § 2510 (4)—"the *aural* acquisition of the *contents* of any wire or oral communication through the use of any electronic, mechanical, or other device" (emphasis added). Any doubt of the correctness of this interpretation is allayed by reference to the legislative history of Title III. The Report of the Senate Committee on the Judiciary in discussing the scope of the statute explicitly states "[t]he use of a 'pen register,' for example, would be permissible." S. Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968).

Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on com-

pliance with the constitutional requirements of the Fourth Amendment.<sup>4</sup> In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register. The District Court seemed to assume that because these extension orders were based in part on tainted evidence, information obtained pursuant thereto must necessarily be suppressed under the "fruit of the poisonous tree" doctrine. 340 F. Supp., at 1041. That is not the law.

The District Court relied on *Nardone v. United States*, 308 U. S. 338 (1939). In that decision the court held that a statutory prohibition of unlawfully obtained evidence encompassed derivative evidence as well. But the Court also reaffirmed that the connection between unlawful activity and evidence offered at trial may become "so attenuated as to dissipate the taint," *id.*, at 341, and that facts improperly obtained may nevertheless be proved if knowledge of them is based on an independent source. *Ibid.* In its constitutional aspect, the principle is illustrated by *Wong Sun v. United States*, 371 U. S. 471 (1963). It is, in essence, that the derivative taint of illegal activity does not extend to the ends of the earth but only until it is dissipated by an intervening event. Of course, the presence of an independent source would always suffice.

The independent-source rule has as much vitality in the context of a search warrant as in any other. Thus, for example, unlawfully discovered facts may serve as the basis for a valid search warrant if knowledge of them

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<sup>4</sup> The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case.

is obtained from an independent and lawful source. See, e. g., *Anderson v. United States*, 344 F. 2d 792 (CA10 1965). The obvious and well-established corollary is that the inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid. The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause. *James v. United States*, 135 U. S. App. D. C. 314, 315, 418 F. 2d 1150, 1151 (1969); *United States v. Sterling*, 369 F. 2d 799, 802 (CA3 1966); *United States v. Tarrant*, 460 F. 2d 701, 703-704 (CA5 1972); *United States v. Koonce*, 485 F. 2d 374, 379 (CA8 1973); *Howell v. Cupp*, 427 F. 2d 36, 38 (CA9 1970); *Chin Kay v. United States*, 311 F. 2d 317, 321 (CA9 1962).<sup>5</sup> Judge

<sup>5</sup> All of the cases cited are directly on point. There are a few additional decisions that indirectly support the general proposition stated above. *United States v. Cantor*, 470 F. 2d 890 (CA3 1972), involved a defendant's claim that the Government violated his Fourth Amendment rights by refusing to disclose to him certain evidence that had been used to establish probable cause for issuance of a warrant. The court rejected that claim on the ground that there was adequate independent justification to find probable cause. *Id.*, at 893. The cases of *United States v. Jones*, 475 F. 2d 723 (CA5 1973), and *United States v. Upshaw*, 448 F. 2d 1218 (CA5 1971), stand for the proposition that the validity of a search warrant based in part on erroneous statements is determined by evaluating the sufficiency of the other allegations. Finally, *United States v. Lucarz*, 430 F. 2d 1051 (CA9 1970), involved a search warrant based on an affidavit containing two paragraphs that invited the magistrate to find probable cause by drawing a negative inference from the defendant's exercise of his constitutional right to the assistance of counsel. The court held the validity of the warrant was to be determined on the basis of the other allegations in the affidavit.

Weinfeld aptly stated the point in *United States v. Epstein*, 240 F. Supp. 80 (SDNY 1965):

"There is authority, and none to the contrary, that when a warrant issues upon an affidavit containing both proper and improper grounds, and the proper grounds—considered alone—are more than sufficient to support a finding of probable cause, inclusion of the improper grounds does not vitiate the entire affidavit and invalidate the warrant." *Id.*, at 82.

I know of no precedent holding to the contrary.<sup>6</sup>

The application of this principle to the pen register extension orders is clear beyond doubt. The original pen register order was based on a showing of probable

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<sup>6</sup> In fact, there are only two cases lending even colorable support to a contrary view. Both are from the Sixth Circuit, and neither can be said to contradict the general proposition stated above. In *United States v. Langley*, 466 F. 2d 27 (1972), the court considered the validity of a warrant issued on the basis of information obtained in a previous warrantless search. The court held the prior search valid in large part and affirmed the validity of the warrant for the second search despite the inclusion in the affidavit of allegations based on the unlawful aspects of the first search. Although the case therefore illustrates the principle stated above, the court added the following comment: "It must be emphasized that where such tainted information comprises more than a *very minor portion* of that found in an affidavit supporting a warrant to search, the warrant must be held invalid." *Id.*, at 35 (emphasis in original). The other case is *United States v. Nelson*, 459 F. 2d 884 (1972), where the affidavit for a search warrant relied on information derived from two prior warrantless searches. Although the court suggested several reasons for suppressing the evidence seized pursuant to the warrant, the principal basis seems to have been the finding that the untainted allegations did not constitute probable cause. Thus neither case contradicts the decisions of the District of Columbia, Third, Fifth, Eighth, and Ninth Circuits cited in the text.



cause made prior to, and therefore undeniably independent of, the invalid wiretap. The affidavit supporting the first extension of the pen register order incorporated the allegations contained in the affidavit submitted for the original order and provided the additional untainted information that Giordano had sold heroin to a narcotics agent on October 17, 1970. The affidavit for the second extension of the pen register order is not included in the record, but there is no reason to doubt that it made a similar incorporation by reference of the earlier, untainted allegations. I would hold the evidence obtained under the first pen register extension order admissible and remand the case for determination of whether evidence obtained under the second extension should be admitted as well.

The basis for the majority's conclusion to the contrary is far from apparent. In the final footnote to its opinion, the Court states that the evidence obtained under the defective original wiretap order "should be considered a critical element in extending the pen register authority." The majority does not suggest, however, that the original pen register order was based on anything less than probable cause. Nor does it deny that the affidavit supporting the extension of the pen register authority fully incorporated the earlier untainted allegations. And, finally, the majority does not contradict the established principle that a warrant based on an affidavit containing tainted allegations may nevertheless be valid if the independent and lawful information stated in the affidavit shows probable cause. In light of these significant silences, the majority's bare assertion that the tainted evidence obtained under the original wiretap order was a "critical element" in the extension of the pen register authority is, to me, an unexplained conclusion—not a rationale.



## II

Unlike the pen register extensions, the wiretap extension order of November 6 is governed by Title III. The provisions of that statute prescribe an elaborate procedure for the lawful interception of wire communications. To the extent that the statutory requirements for issuance of an intercept order are nonconstitutional in nature, the exclusionary rule adopted to effectuate the Fourth Amendment does not pertain to their violation. The statute, however, contains its own exclusionary rule, 18 U. S. C. § 2518 (10)(a), and the scope of the suppression remedy is defined by 18 U. S. C. § 2515 to include derivative evidence:

“Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . .”

The obvious and familiar model for the statutory ban on the use of derivative evidence was the constitutional doctrine of the “fruit of the poisonous tree,” and the legislative history confirms that Congress intended the phrase “no evidence derived therefrom” to incorporate that doctrine and render it applicable to certain statutory violations of nonconstitutional dimensions. The Senate Report makes the point explicitly:

“[Section 2515] largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United States*, 302 U. S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States*, 308 U. S. 338 (1939).) There is, however, no intention to change the attenuation rule. See *Nardone v. United States*, 127 F. 2d 521 (2d), cert. denied, 316 U. S. 698 (1942); *Wong Sun*

v. *United States*, 371 U. S. 471 (1963).” S. Rep. No. 1097, 90th Cong., 2d Sess., 96.

Thus, although the validity of a wiretap order depends on the satisfaction of certain statutory conditions in addition to the constitutional requirement of probable cause, the principle developed in Part I of this opinion is fully applicable to the November 6 wiretap extension order. The question is not whether the application for that order relied in part on communications intercepted under the invalid original order but whether, putting aside that tainted evidence, the independent and lawful information stated in the supporting affidavit suffices to show both probable cause and satisfaction of the various additional requirements of Title III.<sup>7</sup> *United States v.*

<sup>7</sup> The majority seems to believe that this principle, while fully applicable to original wiretap orders, is wholly inapplicable to extension orders. This, at least, is the most reasonable construction of the majority's discussion of §§ 2518 (1) (e) and (f). *Ante*, at 532-533. Those provisions require that an application for an extension order include “a full and complete statement of the facts concerning all previous applications” and “a statement setting forth the results thus far obtained from the interception . . . .” According to the majority, the fact that law enforcement authorities complied with §§ 2518 (1) (e) and (f) by including in the application for the extension order information regarding the earlier wiretap necessarily and automatically rendered the extension order invalid, *regardless* of whether the independent and untainted information in the application for the extension satisfied the requirements of the Fourth Amendment, and § 2518 (3).

With all respect, I find this a baffling interpretation of the statute. Certainly there is nothing in the language or history of §§ 2518 (1) (e) and (f) to suggest that Congress intended these provisions to except all extension orders from the independent-source doctrine. Nor is there any suggestion in the language or history of § 2515, which is the statutory analogue to the constitutional doctrine of the fruit of the poisonous tree, that Congress intended to distinguish between original wiretap orders and extension orders in determining the extent of the suppression remedy. Finally, there is nothing in logic

*Iannelli*, 339 F. Supp. 171 (WD Pa. 1972); *United States v. Ceraso*, 355 F. Supp. 126 (MD Pa. 1973).

The application for the wiretap extension order was supported by the affidavit of a group supervisor from the Bureau of Narcotics and Dangerous Drugs. The same officer had sworn to one of two affidavits submitted in support of the application for the original wiretap order. The other had been filed by a narcotics agent acting under his supervision and stated facts within their joint knowledge. In the affidavit for the extension order, the supervisor swore that he had reviewed both of the earlier affidavits, and he "reassert[ed] the facts, details and conclusions contained in those affidavits." App. 66. Those allegations not only established probable cause to believe that Giordano was engaged in the illegal sale and distribution of narcotics on a fairly substantial scale, 18 U. S. C. § 2518 (3)(a); they also satisfied the additional statutory criteria for issuance of an intercept order. They showed, for example, that Giordano had made numerous telephone calls to numbers listed to well-known narcotics violators and hence that there was probable cause to believe that communications concerning the illegal drug traffic were taking place on Giordano's telephone line. See 18 U. S. C. §§ 2518 (3)(b) and (d). The affidavits also established the inadequacy of alternative investigative means and demonstrated that without a wiretap of Giordano's telephone the narcotics agents would be unable to discover his source of supply or method of distribution. See 18 U. S. C. § 2518 (3)(c). All this was shown on the basis of wholly untainted evidence incorporated and reaffirmed in the affidavit sup-

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to indicate why Congress would have wanted to make such a distinction, and there is no basis in reason to suppose that Congress, if it had intended such a result, would have failed to leave any evidence of that intent.

porting the Government's request for the wiretap extension order.

The affidavit also provided additional untainted information to support the application for the extension order. It set forth, for example, the circumstances of Giordano's sale of \$3,800 worth of heroin to an undercover agent on the day following issuance of the original wiretap order. Moreover, it recounted in great detail highly suspicious conduct observed by federal agents keeping Giordano under physical surveillance.\* Like the allegations incorporated by reference from the earlier affidavits, this additional untainted information was relevant both to the constitutional requirement of probable cause and to the various statutory criteria for issuance of an intercept order. 18 U. S. C. § 2518 (3).

In light of the substantiality and detail of the untainted allegations offered in support of the application for the wiretap extension order, I find no basis for the majority's rather summary conclusion that the communications intercepted under that extension order were derivatively tainted by the improper authorization of the application for the original wiretap order. Because neither the District Court nor the Court of Appeals has considered this question, I would remand the case with instructions that the issue be settled in accord with the principles set forth in this opinion.

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\* The detailed information lawfully obtained through surveillance and undercover work was aptly summarized in paragraph 77 of the affidavit supporting the extension order:

"Giordano exhibits the characteristics of a high-level narcotics trafficker—extreme caution. When travelling, he continually uses various counter-surveillance techniques. In his transactions, he limits his contacts to a small number of trusted individuals." App. 81.